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HAROLD B. WILLEY, Clerk

No. 590

IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

F. P. NEWPORT CORPORATION, LTD.,
Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. NEWPORT CORPORATION, LTD., et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

Page

Jurisdiction 2
Opinions Below 4
Statutes Involved 4
Brief Statement of the Case 11
Questions Presented by This Writ 23
Reasons for Allowing the Writ 26
This case further involves an important question as to Whether Federal Law or State Law would Govern Right to Appeal in a Bankruptcy Case 34

II.

Another highly important question presented by this Writ is Whether the District Court Erred in Allowing Interest on all the Unsecured Claims from the date of the Commencement of Bankruptcy in 1935 38

III.

The Third important point to be decided in the administration of Bankruptcy in connection with this appeal is Whether a Proposed Plan of Reorganization Under Chapter X, which is submitted to the District Court, may be Summarily, and without notice, dismissed under a local rule without being passed upon by the District Court in Accordance with the provisions of Section 141 of the Bankruptcy Act, (11 U.S.C. §§541-549) 45

Page

IV.

Another reason for granting the Writ is to determine the important question of Federal Law as to the amount of Notice that should be given upon the sale of properties of this character 46

V.

An important question of Bankruptcy Law is involved as to Whether the rejection of the sale or re-referal to the referee requires new bidding and new advertising, and whether in the absence of such advertising to the public, to the creditors, to the stockholders and others, the court had jurisdiction to make the sale or to have the sale confirmed at which COLTER had bid before but without condition 50

VI.

Another important question to be decided by this Honorable Court is: Whether the District Court erred in authorizing and directing the sale of the entire properties in Solido rather than in separate parcels 55

VII.

Another important question raised by this petition is: Whether the the Bankrupt Corporation is an aggrieved party within the meaning of the Bankruptcy Act, entitling it to appeal, and to be represented by counsel of its choice 56

Page

VIII.

Another important question for consideration on review is: Whether the order to sell en masse stifles competition and is not equitable in the circumstances because it would be a needless sacrifice of the debtor's property, which is subject to a division and a smaller portion of the sale of the property would satisfy the debt 57

IX.

Another point raised by this appeal is: whether the proceedings had in this case were proper and lawful and permitted under the Bankrupt Act and were in accordance with law, where the District Court declined to confirm the action of the referee of December 9th, 1953 and re-referred the matter to the referee, holding that the bid which had been confirmed was "not a firm bid within the meaning of the law" (Tr. 1, lines 13, 14), and whether it was necessary for the referee to hold a new sale and conduct a formal hearing before the court in accordance with the court's previous order and endeavor to determine the best manner in which the court appraised $604,325.00 of remaining assets can be best disposed of, including an investigation as to any special value that may exist in all the properties, including those in Tulare County as to the growing of cotton and into the Verdugo woodland acreage because of the present demand for subdivision purposes or other

Page

purposes, and as to the value of the oil lands and oil income 58

X.

Another question presented by this appeal is: Whether the sale was necessary at all and in the best interest of the estate. It was not necessary to sell $604,325.00 of Court appraised assets in order to pay creditors claims in the sum of $187,123.88, and remaining expenses of administration 59

XI.

Another question presented by this apeal is: Whether the sale as conducted through the attorney for the purchaser, who was formerly the attorney for the Bankrupt Corporation, does not present a question of fraud on its face so as to nullify the sale 60

XII.

Another question presented by this appeal is: Whether the Circuit Court should not have remanded the case to the District Court for the purpose of taking further testimony upon the allegation that a fraud was perpetrated on the District Court in the sale 62

XIII.

Another question of importance is: Whether the sale was fair and equitable to the stockholders 64

Appendix A ..... App. 1

Appendix B ..... App. 2

TABLE OF CASES AND AUTHORITIES CITED

Cases

Page

Addy v. Short, 89 Atl. A (23, p. 136 35
Arkansas Valley Smelting Co. v. Mining Co., 127 U. S. 379 64
Ashville Lumber Co. v. Hyde, 172 F. 730 34
Bahen & Wright, Inc. v. Commissioner, 176 Fed. 2d 538, 539 (4th Cir.) 12, 29, 30, 35
Baker v. Humphrey, 101 U. S. 494, 25 L. Ed. 1065 61
Bovay v. Townsend, 78 Fed. 2d 343, 346 ..... 49, 51
Burton Coal Co. v. Franklin Coal Co., (8th Cir.) 67 Fed. 2d 797 41
Byers & Surget, 19 How. 303, 15 L. Ed. 670 61
Champlain Pulp & Paper Co. In re, 20 Fed. 2d 245 53
City of New York v. New York, New Haven & Hartford R. R. Co., 344 U. S. 293, 97 L. Ed. 333 52
Defense Supplies Corporation v. Lawrence Warehouse Co., 336 U. S. 631, 634, 635, 93 L. Ed. 931 32
Eastman, Gardiner & Co. v. Warren, 109 Fed. 2d 193 (5th Cir.) 36
Equitable Office Building Corporation, Debtor In re, 96 L. Ed. 1386, at 1390 ..... 45, 64
Gay v. Parpart, 106 U. S. 679, 27 L. Ed. 256 61
Grannis v. Ordean 234 U. S. 385, 58 L. Ed. 1363 52
Harned v. Beacon Hill Real Estate Co., 9 Del. ch. 411, 84 A. 229 36
Haywood Wagon Co. In re, (C. A. A. 2), 219 Fed 655 57
Irvine, In re, 255 Fed. 168 53

Page

Manufacturers Trust Co. v. Becker, 337 U. S. 923, 93 L. Ed. 1731; and 338 U. S. 304, 94 L. Ed. 107, 111 ..... 26, 27
Marsh v. Whitmore, 21 Wall. 178, 22 L. Ed. 482 61
Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865 52
New York v. Saper, 336 U. S. 328, 330, 93 L. Ed. 710, at 714 ..... 39, 40
Peer Manor Building Corporation, Inre, 143 Fed. 2d 769 33
People v. Iseman, 78 Cal. App. 223 63
Pepper v. Litten, 308 U. S. 295, 84 L. Ed. 281 61
Sandford Fork & Tool Co. v. Howe, Brown & Co., 157 U. S. 312 34
Schroeder v. Young, 161 U. S. 334, 40 L. Ed. 721 61
Silk, In re, (2nd Cir.), 55 Fed. 2d 917 41
Sisters of Notre Dame v. Kusmitt, 125 Md. 323, L. R. A. 1916D 792 64
Troustone v. Bauer, Pogue & Co., 144 Fed. 2d 382 37
United States v. Gilliland, 312 U. S. 86, 85 L. Ed. 598 63
U. S. v. Metcalf, 131 Fed. 2d 677 47
United States v. P. F. Collier & Son Corporation, 208 Fed. 2d 936 (7th Cir.) 12, 29, 30, 35, 38
Vanston Bondholders Protec. Com. v. Green, 329 N. S. 156, 163; 91 L. Ed. 166 42
Watts v. Liberty Royalties Corporation (10th Cir.) 106 Fed. 2d 941, 944 ..... 12, 32, 35, 36, 37
Wax v. Riverview Cemetery Co., 2 Terry 424, 41 Del. 424, 24 Atl. 431 36

Codes, Statutes, etc.

Page

Bankruptcy Act
Chapter X 17, 25, 26, 45, 46, 57
Section 1 (8) 32
Section 22, Title 11, Chap. 4, Sec. 45 30
Section 23, Title 11, Chap. 4, Sec. 46 31
Section 24 ..... 4, 28, 31
Section 25 5
Section 48 2
Section 58, Title II, Chap. 6, Sec. 94 52
Section 74 65
Section 77B 12, 35, 37, 65
Section 141 45
Bankruptcy Act, Chapter XII 65
Chandler Act 38
Delaware Code, Title 8, Chap. 1, Sec. 312 ..... 7, 12, 23, 27, 36
Delaware Corporation Code, Secs. 312 and 510 ..... 22, 36
Delaware Corporation Code, Sec. 2071 35
Delaware Revenue Code, Section 35 35
Fair Labor Standard Act of 1938, as amended, 29 U.S.C.A., Sec. 201 (208 Fed. 2d 936, 937) 30
Section 42 Revised Code of Delaware, 1935, ch. 65, as amended in 1941, ch. 132, Sec. 11, 8 Del. C. Secs. 8, 278 ..... 6, 11
Section 2074, Revised Code of Delaware of 1935, Chapter 65, as amended in 1941, Chapter 132, Sec. 11, 8 Delaware Code 278 ..... 30, 34

Page

United States Code
Sections 24, 24 (b) (c), Title XI, Chap. IV, Sec. 47 (c) 2
Section 25, Title XI, Chap. IV 2
Sections 47, 48, Title 11, Chap. 4 ..... 4, 5
Sections 1254, 1334, Title 28 3
Section 2002, Title 28 54
Section 2101 (c), Title 28 ..... 3, 4, 10
Section 2106, Title 28 64

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Earl Warren, and to The Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, the F. P. NEWPORT CORPORATION, LTD., respectfully petitions for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse an order of that Court dismissing the appeal of the petitioner herein, and to review and reverse the orders

of the United States District Court affirming the Referees in Bankruptcy, which approved the sale of all the Newport assets and the payment to unsecured creditors of not only their full claim but also about 135% interest thereon; also to review and reverse the error of the United States Court of Appeals refusing to vacate the judgment of the District Court for fraud upon that Court and remand the case to the District Court for further proceedings in accordance with the motion of the appellant.

JURISDICTION

Jurisdiction is conferred by Section 24, 24(c) (U. S. Code Title XI, Chapter IV, Section 47(c)), and Section 25 (U. S. Code Title XI, Chapter IV), Section 48 of the Bankruptcy Act. The amount involved is $407,000.

Section 24(b) provides that appellate jurisdiction to the Circuit Court of Appeals of the United States "shall be exercised by appeal and in the form and manner of an appeal."

Subsection (c) of Section 24 provides:

> "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force, or such as may hereafter be enacted."

Title 28, Section 1334 gives the United States District Courts original jurisdiction of all matters and proceedings in bankruptcy.

Section 1254 of Title 28 provides for the *review* by the Supreme Court:

> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Section 2101 (c) of Title 28 provides for review when taken or applied for within 90-days after the entry of such judgment or decree.

The appellant duly and regularly filed Notice of Appeal from the judgment of the United States District Court dated July 12, 1954 (R. 629). Notice of Appeal was filed in the District Court on August 10th, 1954, and within the time allowed by law.

After the docketing of the record a motion was made in the United States Court of Appeals for the Ninth Circuit by Paul W. Sampsell, Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., on November 1st, 1954 and was heard and argued on November 10th, 1954, and an order was made and entered *per curium* November 12th, 1954 ordering the appeal of the appellant to be dismissed, (R. 706), and denying the motion of the appellant to remand the case to the District Court for hearing of evidence of a fraud perpetrated upon the District Court.

A Petition for Rehearing was duly and regularly filed on both motions, and denied by the United States

Court of Appeals for the Ninth Circuit on December 17th, 1954. (R. 708).

This petition to review and reverse the orders of the United States Court of Appeals for the Ninth Circuit on both motions is filed in this Court within the 90-day period allowed by Title 28, Section 2101 (c), U. S. Codes.

OPINIONS BELOW

The opinion of the Court of Appeals is found in the Appendix to this Petition, and also page 706 of the record.

The opinion of the Court of Appeals (9th Cir.) is found in 216 Fed. (2) 344.

The opinion of the United States District Court is found in 123 Fed. Supp. 95.

STATUTES INVOLVED

Section Twenty-Four of the Bankruptcy Act provides as follows (United States Code, Title 11, Chap. 4, Sec. 47):

> "§24. *Jurisdiction of Appellate Court.* a. The [Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia,] United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate

jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the [Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia] United States courts of appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

Section Twenty-Five of the Bankruptcy Act provides as follows, (United States Code, Title 11, Chap. 4, Sec. 48):

"§25. *Practice on Appeals.* a. Appeals under this Act to the [Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia] United

States courts of appeals shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service, or, if such notice be not served and filed, then within forty days from such entry."

Section 42 Revised Code of Delaware, 1935, ch. 65, as amended in 1941, ch. 132, Sec. 11, 8 Del. C. §8 278, as follows:

"*Continuation of Corporation after Dissolution for Purposes of Suit, etc.* All corporations, whether they expire by their own limitations, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their businesses, to dispose of and convey their property, and to divide their capital stock but not for the purpose of continuing the business for which said corporation shall have been established; provided, however, that with respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to such expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of such expiration or dissolution, such corporation shall only for the purpose of such actions, suits or proceedings so begun or commenced be continued bodies corporate beyond said three-

year period and until any judgments, orders, or decrees therein shall be fully executed."

Title 8, Chapter 1, Section 312 of the Delaware Code provides as follows:

"§312. *Renewal, revival, extension and restoration of charter.*

(a) Any corporation existing under the laws of this State, may, at any time before the expiration of the time limited for its existence and any corporation existing under the laws of this State whose charter has become inoperative by law for non-payment of taxes and any corporation existing under the laws of this State whose charter has expired by reason of failure to renew the same or whose charter has been renewed, but, through failure to comply strictly with the provisions of this chapter, the validity of whose renewal has been brought into question, may at any time procure an extension, restoration, renewal or revival of its charter, together with all the rights, franchises, privileges and immunities and subject to all of its duties, debts and liabilities which had been secured or imposed by its original charter and all amendments thereto.

(b) The extension, restoration, renewal or revival of the charter may be procured by filing with the Secretary of State a certificate of any two of its last acting officers or other officers to be elected as provided in subsection (h) of this section, duly sworn or affirmed to by such officers before any person authorized by the laws of this State to administer oath or affirmations. The certificate shall

not be executed by any officer and his assistance officer, as for instance a secretary and an assistant secretary, and the two officers executing the certificate shall not be one and the same person.

(c) The certificate prescribed in subsection (b) of this section shall state—

(1) The name of the corporation, which name shall be the existing name of the corporation or the name it bore when its charter expired, except as otherwise provided in subsection (f) of this section;

(2) The name of the city, town or place within the county in which its principal office or place of business is located in this State and the name of its resident agent and, in towns or cities of over 6000 inhabitants, the street and number of its principal office or place of business and its resident agent;

(3) Whether or not the renewal, restoration or revival is to be perpetual and if not perpetual the time for which the renewal, restoration or revival is to continue and, in case of renewal before the expiration of the time limited for its existence, the date when the renewal is to commence, which shall be prior to the date of the expiration of the old charter which it is desired to renew;

(4) That the corporation desiring to be renewed or revived and so renewing or reviving its charter was duly organized under the laws of this State;

(5) The date when the charter of the corporation would expire, if such is the case, or such other facts as may show that the charter

has become inoperative or void or that the validity of any renewal has been brought into question;

(6) That the certificate for renewal or revival is filed by authority of those who were directors or managers of the corporation at the time its charter expired or who were elected directors or managers of the corporation as provided in subsection (h) of this section.

(d) The certificate shall be filed in the office of the Secretary of State, who shall furnish a certified copy of the same under his hand and seal of office. The certified copy shall be recorded in the office of the recorder of the county in which the principal office of the corporation is located in this State, in a book kept for the purposes. The certificate or a certified copy thereof duly certified under the hand of the Secretary of State and his seal of office accompanied with the certificate of the recorder of the county wherein the same is recorded under his hand and seal of office, stating that it has been recorded, the record of the same in the office of the recorder, or a copy of the record duly certified by the recorder, or the record of the certified copy recorded in the recorder's office, shall be evidence in all courts of this State.

(e) Upon the recording of the certificate the corporation shall be renewed and revived with the same force and effect as if its charter has not become inoperative and void or had not expired by limitation. Such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the

corporation, its officers and agents during the time when its charter was inoperative or void or after its expiration by limitation, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect. All real and personal property, rights and credits, which belonged to the corporation at the time its charter became inoperative or void, or expired by limitation and which were not disposed of prior to the time of its revival or renewal shall be vested in the corporations, after its revival and renewal, as fully and amply as they were held by the corporation at and before the time its charter became inoperative or void or expired by limitation, and the corporation after its renewal and revival shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its officers and agents prior to its reinstatement, as if its charter had at all times remained in full force and effect."

. . . (Other sections not pertinent.)

Section 2101(c), Title 28, U. S. Codes, as follows:

"§2101. Supreme Court; time for appeal or certiorari; docketing; stay:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

BRIEF STATEMENT OF THE CASE

This is a petition for certiorari to review an order of the Court of Appeals dismissing the appeal of the F. P. Newport Corpration, Ltd., as a "purported appeal" because the trustee in bankruptcy, having failed to pay and continuing to fail and refusing to pay the franchise taxes of the State of Delaware (allowed in bankruptcy with ample funds in his possession), its charter was declared void April 1, 1937 by the State of Delaware. Such declaration of invalidity under Delware is only conditional.

Proceedings in bankruptcy were commenced against the corporation two years prior to 1937 when the corporation's Delaware Franchise taxes were not in default.

The State of Delaware itself has provided that any corporation, whose taxes are in default, nevertheless continues to exist with respect to any action, suit, or proceeding begun or commenced by or against the corporation within three years after the date of such expiration or dissolution ". . . and until any judgments, orders or decrees therein shall be fully executed." (Sec. 42 Revised Code of Delaware, Ch. 65 as amended in 1941, Ch. 132 Sec. 11; 8 Del. Code 278).

"Bankruptcy" is an an action, suit, and proceeding within the above Statute, and until all its proceedings are concluded we maintain that the corporation exists. Also certain circuits of the federal courts in interpreting Delaware law have held that corporations whose

charters have been declared void for non-payment of taxes continue:

1. For proceedings under Section 77B of the Bankruptcy Act seven years after the charter lapsed.

Watts v. Liberty Royalties Corporation (10th Circuit, 106 Fed. (2) 941, 944.

2. For criminal prosecutions. The Court's opinion specifically includes "bankruptcy" as being extended.

U. S. v. P. F. Collier & Son Corp., 208 Fed. (2) 936 (7th Cir.).

3. For tax cases.

Bahen and Wright v. Commissioner, 176 Fed. (2) 538, 539 (4th Circuit).

The State of Delaware itself, while declaring the charter "void" for non-payment of taxes, really says it is really only voidable, because by Section 312 of Title 8 of Delaware Code it says that the corporation may be reinstated upon the payment of its delinquent taxes during the period it was in existence to the date it was declared "void" and thus it would be reinstated and "such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the corporation, its officers and agents during the time when its charter was inoperative or void, or after its expiration by limitation, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect."

Thus if the trustee had paid the claim of the State of Delaware (Claim 32, allowed) or would still pay it, the charter of the corporation would be reinstated and all its acts valided in any event.

Petitioner has made a demand on the trustee to pay the Franchise tax of the State of Delaware, but the trustee has refused and failed to do so.

The trustee should not be allowed, by his failure or refusal to act, to deprive the corporation of its right to appeal and should be estopped from doing so, under equitable principles which govern bankruptcy.

The trustee, with the permission of the District Court of the United States has at all times operated the F. P. Newport Corporation as a going concern. He has paid California franchise taxes throughout this period until 1952 when he determined to petition the Court to sell its assets, out of which he paid off or settled almost $2,000,000 indebtedness, leaving only $187,000 of unsecured claims to be paid.

Can he now deprive the corporation of substantial rights of appeal and a possible reversionary right of perhaps more than a quarter of a million dollars, depending on the outcome of the appeal, by his failure and refusal to pay the taxes of the State of Delaware?

Important questions of bankruptcy law not heretofore decided by this Court and a conflict in the circuits which should be resolved by this Court are urged as grounds for certiorari.

Another important question is whether the Circuit Court erred in denying appellant's motion to remand the case for fraud upon the District Court where that Court set upon conditions of the sale to a "qualified buyer" and it was misrepresented to the Court that the buyer "R. T. Colter and his wife, Robbie Colter" were the buyers, when they were not, but rather a "syndicate" was buying it, whose membership were unknown and not disclosed to the Court below.

Other important questions in bankruptcy, as set out in our questions presented, remain undetermined by this appeal, unless certiorari is granted and the orders of the Court below are reversed.

The F. P. Newport Corporation was a firm holding and conducting large real estate operations mostly in the County of Los Angeles, State of California, including valuable real estate subdivision property and valuable oil bearing properties, and certain properties in Tulare County, California, in its holdings.

On March 13th, 1935, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of California (R. 604) against the F. P. Newport Corporation, a Delaware Corporation, whose taxes were then fully paid up in Delaware. At that time the corporation owed about two million dollars, which it was unable to pay then, having been hit hard by the depression of 1933. The case was set down for jury trial on the involuntary petition, and on January 12th, 1937 an adjudication in bankruptcy was entered by consent of the bankrupt,

or an officer thereof. Every since March 13th, 1935, the estate of the bankrupt has been continuously administered in the United States District Court. (R. 604).

The United States District Court gave the corporation and the Trustee for the corporation consent to carry on business as a going concern. Throughout this entire period (from 1935 until 1952) the corporation paid corporation franchise tax to the franchise tax commissioner of the State of California. The corporation was a Delaware corporation and the tax commissioner of the State of Delaware was notified of the bankruptcy proceedings, and he thereupon proceeded to file a claim for the Delaware state taxes with the Trustee. (Claim 32).

The corporation continued under the bankruptcy act and with the consent of the Court to do business and has done so successfully and profitably, and it has met its various obligations. The tax claim of the State of Delaware was allowed in the bankruptcy court but it was not paid by the Trustee, but is among the claims to be paid out of the sale of the assets. (R. 634—Claim No. 32) or otherwise out of funds in the possession of the Trustee.

On April 1st, 1937, the State of Delaware forfeited the corporate charter of the Newport Corporation for nonpayment of Delaware taxes. (R. 639). The corporation, nevertheless, continued to be operated by the Trustee under the authority granted to it by the United States District Court, Southern District of California, Central Division, and has continued to pay its Cali-

fornia state franchise tax until 1952. Furthermore, in 1941, and at other times the bankrupt corporation was by the said trustee asked to join in, and did join in, to the entering of leases for oil drilling on its valuable properties in the Long Beach, California, area, and signed through its officers and joined in the leases made by the Trustee; thus, the Trustee acknowledging that the corporation had certain rights and was functioning also.

At until shortly before the time of the original bankruptcy proceeding, the corporation was represented by William H. Neblett, attorney-at-law. After the resignation of Neblett the corporation was subsequently represented by L. M. Cahill, Esq. (R. 684). Since that time, Mr. Neblett has represented R. T. Colter, the purported purchaser of the assets of the F. P. Newport Corporation, Ltd., and has aided the trustee in every way to oust his former client, the F. P. Newport Corporation, Ltd., from its right of appeal. (R. 683-695).

Through the years of its operation as a going concern, the Newport Corporation has succeeded in disposing of and clearing up debts amounting to close to two million dollars. The total unsecured claims as of October 7, 1954 were only $187,906.84. (R. 635).

On April 14th, 1952, Paul W. Sampsell, the Trustee in Bankruptcy, filed his verified petition to liquidate the assets of the F. P. Newport Corporation, Ltd. It also asserted it had a bid from R. T. Colter to purchase the assets for $350,565.15 cash upon confirmation of

the sale. (R. 611). One advertisement was inserted in the Los Angeles Times and one advertisement was inserted in the Los Angeles Examiner regarding the proposed sale. The proposed purchase was conditional upon the purchaser receiving back from the trustee all the moneys collected or deposited from the sale of oil. Judge McCormick rejected this proposed bid on February 9th, 1954, and re-referred the matter to the Referee in Bankruptcy "for the purpose of conducting a further formal hearing in court, pursuant to the Bankruptcy Act, and in such manner as to his judgment and discretion shall warrant, and if possible obtaining a firm, definite, positive, certain bid for the property of the bankrupt estate." This in our opinion constitutes a rejection of the bid and required new notice and new bidding. In the meantime, the corporation and petitioner proposed a Plan of Arrangement under Chapter X of the Bankruptcy Act and for reorganization of the corporation. Petition for reorganization was filed in the United States District Court on January 19th, 1954. No hearing was held on the petition for the proposed plan of the corporation, but on April 20th, 1954, another District Judge without notice to the petitioner or a hearing thereon directed the Clerk to enter a dismissal of the petition for noncompliance of local rule 218(b) which requires application for the approval of this petition within ten days.

During the pendency of this petition, on March 15th, 1954, the trustee filed his amended and supplemental petition for authority to sell the real and per-

sonal property and for confirmation of the proposed sale of real and personal property to R. T. Colter and Robbie Colter, his wife, as joint tenants. They proposed the purchase of the assets for $350,564.15. The date for the hearing was not advertised in any daily newspaper, but a single ad giving legal descriptions of the properties involved was published in the Los Angeles Daily Journal (a newspaper with a circulation of about 4000 copies and devoted to the interests of lawyers and judges and circulating among courts and lawyers). No further advertisement or publicity was given to the proposed new sale.

In these new proceedings, Attorney William H. Neblett stated he was now representing the Colters.

Hearings were set on the amended and supplemental petition before Reuben G. Hunt, a Referee in Bankruptcy, on April 7th, 8th and 9th, 1954, and the reports thereof are covered in the reporter's transcript of the first four volumes forwarded to this Court. During these proceedings and in the District Court (before another judge than Judge McCormick, who referred back the final bid), the objections of the bankrupt were heard and considered on their merits.

During the course of the hearings, there was a request made, concurred in by the trustee that the proposed purchasers qualify financially as to their ability to make the deal and purchase themselves.

R. T. Colter is a man 82-years old, suffering from cancer and was operated on for a brain tumor. It was

later stated that his physical condition was such that he was not able to and is not able to carry on business activities. (R. 653). It was a condition of the sale that each of the buyers personally qualify as to their financial ability and otherwise to see the deal through. It was represented to the Referee and the District Court that Mr. and Mrs. Colter had the money themselves and intended to make the purchase themselves. F. P. Newport, the President of the F. P. Newport Corporation, discovered after the confirmation of the sale that Colter did not intend to go through with the deal himself and was out of the deal, and that actually the deal was being worked through Mr. Neblett by a syndicate of buyers. The corporation thereupon made a motion to remand the case to the United States District Court for further proceedings to determine the facts as to whether a fraud had been perpetrated on the Court (R. 614, *et seq.*). In an affidavit in opposition to the motion, Wm. H. Neblett impliciting admitted that Colter was not the buyer, stating that Mr. Colter instructed Neblett to help him put together another "syndicate" to purchase the bankrupt estate, pursuant to the order of liquidation. (R. 688). Such a syndicate is not a "purchase by Colter."

Other individual bidders qualified personally as to their assets being in excess of a million dollars. Following the hearings of April 6th, 7th, 8th and 9th, 1954, the purported bid of "R. T. Colter and Robbie E. Colter, his wife, as joint tenants," for $407,000.00 cash on confirmation by the Court was approved by the Ref-

eree. Hearing on most of the claims of the creditors did not come up until 1952, at which time they were first allowed and approved. Although some of the claimants had not filed any claim for interest, the Referee nevertheless allowed them interest from the date of the commencement of the bankruptcy proceedings in 1935, thus adding approximately 135% to each of the claimants' claim by reason of the interest allowed at the rate of 7% per annum on each of the claims for a period of 19-years. This allowance of interest, without any claim therefor by many claimants, would wipe out a substantial reversionary right in the bankrupt corporation as resulting *cestui que* trust.

The referee in the bankruptcy court in Finding XVI allowed interest on all claims—a total of $250,-913.59 from the beginning—a period of about 19 years interest. The district judge affirmed and his opinion reaffirms the allowance of interest specifically (123 Fed. Sup. 95) as found by the referee.

The orders of the referees came on for review before the United States District Judge who affirmed his order of sale to the Colters, and upheld his allowance of interest (R. 618, 627) in full and from the beginning of bankruptcy.

No case was cited to the new District Judge or by the District Judge wherein interest has ever been allowed in a proceeding in bankruptcy which commenced as an involuntary proceeding and was acted upon as such in that manner, and from such date.

An appeal was duly and regularly taken to the United States Court of Appeals for the Ninth Circuit and during the pendency thereof, a motion was made in the District Court to dismiss the appeal because the Newport Corporation's charter had lapsed in 1937. The District Court denied the motion. No appeal was taken from the denial of the motion in the District Court. The motion was again renewed in the United States Court of Appeals upon the docketing of the record in that Court. (R. 598). Thus, although the corporation has been doing business under the authority of the bankruptcy court for a period of 19-years and paid its franchise tax in the State of California, and although the Referee in Bankruptcy held lengthy hearings and the District Court reviewed the matters handled by the Referee on its merits, the Court of Appeals nevertheless held that the F. P. Newport Corporation had no right to appeal and that the *purported* appeal should therefore be dismissed. It also denied appellant's motions to remand the case because of a fraud perpetrated on the Bankruptcy Court by the purported purchaser.

It was conceded in the oral orgument on appeal before the Court of Appeals that if the District Court improperly allowed interest on all of the claims dating back to 1935, that the F. P. Newport Corporation would be solvent and not bankrupt, and would receive a substantial sum of money in excess of $200,000 from the proceeds of the sale, even if the sale itself was allowed to go through.

The assets of the F. P. Newport Corporation were appraised by a court appointed appraiser as being in

excess of $600,000.00 in value, and by F. P. Newport (himself a veteran real estate man and appraiser) at in excess of $800,000.00. The sale price on the confirmation was only half of the latter.

One of the reasons attributed to the low price of the sale was that the Referee ordered the sale of all the estate in bulk rather than segregating the properties and selling them separately. Part of the properties were potential real estate developments; other parts of the property were oil bearing properties. There was no relationship between the two, nor any reason why they should have been sold together.

The claim of the State of Delaware as a preferred claim has been allowed by the Referee in Bankruptcy (see also Appendix) (Claim 32).

The Trustee in Bankruptcy is presently in possession of cash assets in excess of $40,000.00 from which he could pay up the Delaware taxes and reinstate the corporation to all its rights if the sale of the assets are approved he will receive enough to pay the franchise tax in full, which has been approved as a preferred claim, and thus under Delaware Law all of its acts will have become valid and validated pursuant to Section 312 and 510 of the Delaware Corporation Act. The Trustee certainly should not be permitted to prevent the appellant from appealing by reason of his retention of the monies and his failure to pay the Delaware corporation franchise taxes, and thus validly reinstate the corporation in full. See Section 312 and Section 510 of the Delaware Corporation Code.

The Trustee has the duty to protect the resulting beneficiary, the bankrupt in this case, as resulting *cestui que trust.* There is a want of equity in his deliberate failure to do so.

QUESTIONS PRESENTED BY THIS WRIT

(1) Whether the appellant, the F. P. Newport Corporation, Ltd., which would have a substantial reversionary right ($200,000 or more) from the sale of the assets of the F. P. Newport Corporation and is a resulting *cesti que* trust, has a right to appeal where it has been doing business at all times under the permission of the United States District Court and has been operating under a franchise tax within the State of California although its original charter of the State of Delaware was declared void (conditionally) for nonpayment of taxes on April 1st, 1937, two years after the commencement of bankruptcy proceedings, and where its charter could be reinstated immediately and all its past acts validated under Title 8, Section 312, Delaware Corporation Code if the trustee in the performance of his required duty would pay the Delaware delinquent taxes.

(2) Whether under the Delaware Corporation Statutes as interpreted by the State of Delaware itself the F. P. Newport Corporation continued to exist as a matter of law after bankruptcy as a "proceeding" within the meaning of Delaware Corporation Law allowing the corporation to continue until all decrees are executed.

(3) Whether in any event a corporation acting either *de jure* or *de facto* and subject to receive a large sum of money if its contentions on appeal are upheld, has a right to appeal from the orders of the United States District Court which considered and heard his rights and claims on the merits and ruled against them upon four days of trial before the referee.

(4) Whether the Trustee in Bankruptcy who has ample funds on hand, has a duty to pay up all delinquent taxes of the State of Delaware and thus under Delaware Law reinstate the corporation to all its rights and confirm all its acts from the time its charter was declared void. Whether by his failure to do so there is a want of equity on the part of the Trustee and he is estopped to assert himself against his resulting *cestui que* trust, the bankrupt, on this ground, and thus deny the bankrupt his right of appeal.

(5) Whether the United States Court of Appeals erred in failing to remand the case for fraud committed upon the District Court, where it is shown and not controverted that the purported buyer did not qualify, as required in the District Court, as a qualified buyer, and where it was misrepresented to the District Court that he was the actual purchaser.

(6) Whether the District Court erred in allowing interest at 7% from the date of the involuntary proceedings in bankruptcy, or in ordering the unsecured creditors paid 135% interest, approximately one and one-third more than their original indebtedness where there was no claim therefor.

(7) Whether the Chandler Act of 1938 allows interest in an involuntary proceeding in bankruptcy to the unsecured creditors from the date when the involuntary proceedings were first filed, and whether that interest is allowable at the rate of 7% per annum.

(8) Whether interest is allowable if no claim for interest is filed.

(9) Whether interest if claimed and allowed, is only from date of allowance of claim (May, 1952) and not date of commencement of proceedings, 1935.

(10) Whether the District Court erred in holding that there had been adequate notice and publication of the proposed sales of the assets, such as would bring buyers who would give more than fifty per cent, or seventy-five per cent, of the appraised value of the properties.

(11) Whether the Court erred in holding that the properties, which were a mixture of real estate development and oil bearing properties and possible cotton land, should be sold together, or in bulk.

(12) Whether the referee had jurisdiction to consider a sale on an amended petition without treating it as a new proceeding with new notice to creditors of a new sale, and new and adequate advertising.

(13) Whether the Court erred in summarily dismissing the proceedings under Chapter X of the Bankruptcy Act without setting the same down for hearing and giving the parties an opportunity to set forth a

plan, and have the same considered by the creditors and all of the parties. Whether a local rule of court may supplant the plain requirements of Chapter X of the Bankruptcy Act.

(14) Whether a sale to a proposed purchaser through an attorney who formerly represented the corporation was such an adverse interest on its face as to vitiate the sale.

REASONS FOR ALLOWING THE WRIT

I.

(1) The writ should be allowed as presenting important questions of bankruptcy law never heretofore decided by the Supreme Court of the United States and important in the general administration of involuntary bankruptcy and corporate affairs. (2) There is a conflict between the Circuit Courts on some of the important questions involved.

> *Manufacturers Trust Co. v. Becker,* 337 U.S. 923, 93 L.Ed. 1731; and 338 U.S. 304, 94 L.Ed. 107, 111.

Here the corporation continued to exist for 19 years and do business as a going concern throughout the years, under the authority of the United States District Court. At no time was its powers or its functions held to be inadequate to continue throughout the years, but its vitality was considered of sufficient importance to

get it to join with the trustee in the making of valuable oil leases in Long Beach area.

This Court said, in a footnote, in *Manufacturers Trust Co. v. Becker,* 338 U.S. 304, at 312, 94 L.Ed. 114:

> "Courts of equity, in defining the responsibility of officers of a corporation which is insolvent and yet a going concern, have frequently assigned greater importance to the corporation's vitality than to its insolvency. E.g., *Sanford Fork & Tool Co. v. Howe, Brown & Co.,* 157 U.S. 312, 39 L.Ed 713, 15 S. Ct. 621 (1895); *White, Potter & Paige Mfg. Co. v. Henry B. Petters Importing Co.,* 30 F. 864."

So, here, throughout the proceedings, the District Court treated the company as a going concern; the Trustee paid its California franchise tax through 1952; he neglected to pay the Delaware tax, although the State of Delaware did file its claim with the Court and that claim was allowed (Claim 32) and he has had and has ample funds to pay these taxes, the effect of which would be to confirm all acts of the corporation done from the date of the expiration of the charter for non-payment of taxes. 8 Del. Code Ann. Sec. 312.

Under these circumstances the trustee who came into the District Court and had four days of hearings on confirmation of the sale and a review by the United States District Judge on the theory that it was a going concern and its assets should now be sold, and in which the appellant fully participated in the proceedings on its merits, should not now be heard to say that the rights

of appeal guaranteed by Section 24 of the Bankruptcy Act do not apply in the Court of Appeals and this Court. Congress has specifically authorized reviews from matters of sale and orders approving this in courts of bankruptcy, and has granted appellate jurisdiction in the form and manner of an appeal. (Section 24 of the Bankrupt Act).

Here the appellant has a substantial financial interest in the successful outcome of the appeal. If it should be held on one point alone—namely the question of interest, that interest was improperly awarded to the clamants at the rate of approximately 135% interest on each of the unsecured claims, then the appellant woud have a very substantial equity and reversionary right in the monies of the sale if the sale itself is confirmed at an adequate price ($200,000 or better).

Again, if the Court should hold that the sale was not properly advertised and that a proper advertisement would bring a much higher price and more bidders, rebidding and resale of the properties would again bring valuable results to the appellant herein.

Also, if the Court should hold that it was improper to sell all of the mixed assets(real estate development and oil lands) in one package and in bulk, and that the referee erred therein, the appellant would benefit by individual sales, which could result in a much higher sum being received than that obtained from the bulk sale.

These are only among some of the questions in which the appellant has a substantial interest on appeal.

The appellant has been acting as a *de facto* corporation, if not a *de jure* corporation, and was at all times considered by the Trial Court and District Court as in existence, and we submit that Congress intended it to have a right of appeal in this matter, and that its appeal should not have been summarily dismissed.

In this view of the situation, the Federal Bankruptcy Act superseded the laws of the State of Delaware. The involuntary proceedings against the appellant were commenced in 1935. At that time this corporation was in good standing in the State of Delaware. Delaware law recognizes the continuance of the corporation thereafter. All matters in bankruptcy date from the date of the filing of the petition in bankruptcy.

But, even under the laws of the State of Delaware, the case of the Ninth Circuit is definitely in conflict with the decisions of several circuits. In the Seventh Circuit in *United States v. P. F. Collier & Son Corporation,* 208 Fed. 2d 936, and the Court of Appeals for the Fourth Circuit in *Baker & Wright, Inc. v. Commissioner,* 176 Fed. 2d 538, it is held that a Delaware Corporation continues after dissolution after the three-year period from such expiration for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business; to dispose of and convey their property and to divide their capital stock, in respect to any action, suit, or proceeding begun or commenced by or against the corporation within three years after the

date of such expiration or dissolution, and until any judgments, orders, or decrees shall be fully executed. (Section 2074, Revised Code of Delaware of 1935, Chapter 65, as amended in 1941, Chapter 132, Sec. 11, 8 Delaware Code 278).

In the *Collier* case the Seventh Circuit held that the words "any action, suit or proceeding" as used in the Delaware statute embrace "all forms of litigation, civil, criminal, *bankruptcy*, and admiralty." "The words carry such a plain meaning that they are hardly open to construction, and their employment leaves no room to speculate on legislative intent." The Court, in that case, held that the dissolved Delaware corporation was still subject to criminal prosecution under the Fair Labor Standard Act of 1938, as amended, 29 U.S.C.A. §201. (208 Fed. 2d 936, 937.)

And, the Court of Appeals for the Fourth Circuit, in *Bahen & Wright, Inc. v. Commissioner*, 176 Fed. 2d 538, at 539, said:

> "The Delaware statute explicitly provides for continued corporate existence for as long as may be necessary to reach a final determination of any 'proceeding' as well as any 'action or suit' begun by or against the corporation within three years of its dissolution. The word 'proceeding' is obviously broader than action or suit and should be given full effect in order to achieve the fundamental purpose of the statute."

From the date of commencement of bankruptcy "proceedings" commenced. Section 22 of the Bankruptcy Act, Title 11, Chapter 4, Section 45, says:

"The judge may at any stage of a *proceeding* under this title refer the same to a referee, either generally or specially."

Section 23 of the Bankruptcy Act, Title 11, Chapter 4, Section 46, says:

"The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from *proceedings* under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired," etc.

Section 24 of the Bankruptcy, (U. S. Code, Title 11, Chap. 4, Sec. 47) says:

"The [Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia], United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in these respective jurisdictions in *proceedings* in bankruptcy, either interlocutory or final, and in controversies arising in *proceedings* in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact," etc.

Thus, the Delaware statute, by its very terms, encompasses the right of a corporation in good standing at the time the *proceedings* in bankruptcy commenced to continue such bankruptcy in all its phases, with all its attendant rights of appeal and review.

The Tenth Circuit in *Watts v. Liberty Royalties Corporation,* 106 F. (2) 941, 944, also held that a proceeding under 77 B in Bankruptcy could take place seven years after the charter was declared void.

The laws of Delaware, therefore, expressly permit the continuance of bankruptcy proceedings to their conclusion; and until the conclusion thereof; and the decision of the Court of Appeals for the Ninth Circuit, in dismissing the appeal, is in conflict with the decisions of the Seventh, Fourth and Tenth Circuits. This Court should grant certiorari also to resolve the conflict between the circuits, as to the meaning and existence of a corporation for the purposes of determining the rights of the parties.

Furthermore, this Court in *Defense Supplies Corporation v. Lawrence Warehouse Company,* 336 U. S. 631, 634, 635, 93 L.Ed. 931, held that this Court in its supervisory powers, even of a dissolved corporation, had the right to consider the matters on appeal to resolve them properly even though the Defense Supplies Corporation had been dissolved by an Act of Congress.

Since Bankruptcy proceedings proceed upon equitable principles, it would be highly inequitable to deny the bankrupt, who has a substantial interest in the review of the decision on appeal, the right to have this Court determine the correctness of the decisions below.

Furthermore, Section 1 (8) of the Bankruptcy Act defines a "corporation" as follows:

"A corporation shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include partnership associations organized under laws making the capital subcribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees, or when beneficial interest or ownership is evidenced by a certificate or other written instrument."

The trustee conducted the business of the F. P. Newport Corporation; one of the oil leases for Newport Corporation property was evidenced by a written instrument joined in by the F. P. Newport Corporation, Ltd. and its president F. P. Newport who joined with the trustee in the lease agreements.

In any event, the corporation operating with the consent of the Court was, in fact a *de facto* corporation.

It must be borne in mind that the proceedings commenced against the Newport Corporation were involuntary proceedings in bankruptcy. Even after dissolution of an involuntary corporation, it has been held that a corporation is considered alive in order to carry out the fundamental bankruptcy purpose, and thus enable the corporation to wind up its affairs.

In re Peer Manor Building Corporation, 143 Fed. 2d 769.

The court should vote to whether the corporation, though technically insolvent, is a going concern.

Sanford Fork and Tone Co. v. Howe, Brown and Co., 157 U. S. 312;
Ashville Lumber Co. v. Hyde, 172 F. 730.

Furthermore, Delaware cases have held that even under its own statute the word "void" as used therein does not mean void in the strict sense of the word, for by the payment of taxes the corporation is immediately restored to good standing in that state. Thus the word "void" in the Delaware Statute is only conditional.

Nevertheless, the corporation without the payment of taxes continued to function in the State of California throughout the years, paying its special taxes there.

This case further involves an important question as to Whether Federal Law or State Law would Govern the Right to Appeal in a Bankruptcy Case.

If the case could be dismissed because of the franchise tax commissioner's need for money in the State of Delaware, it would in effect be a holding that state law and not federal law would govern the rights of appeal in bankruptcy proceedings.

Since the corporation was in good standing as far as the State of Delaware was concerned at the time the proceedings in bankruptcy were commenced against it by filing of an involuntary petition, under the laws of Delaware (Revenue Code 1935, Section 2074, *et seq.* as amended in 1941), its right to carry out all of the proceedings in bankruptcy continued throughout.

Revenue Code, Section 35—Section 2071 of the Delaware Corporation Code is but an expension of the equitable doctrine that the properties of the corporation that does not pay its franchise tax does not escheat to the state, or revert, but will be administered completely for the purpose of winding up.

Addy v. Short, 89 Atl. A (2), page 136;
Bahen v. Wright, 176 Fed. 2d 538.

That this has also been the holding of the Federal courts in other circuits is shown by the case of Watts v. Liberty Royalties Corporation (10th Circ.) 106 Fed. 2d 941, 944. In that case the Tenth Circuit held that even though more than three years had elapsed after the payment of its franchise tax a petition under Section 77B of the Bankruptcy Act for reorganization would lie to carry out these purposes. Thus, the decision of the Court of Appeals for the Ninth Circuit is in conflict with the decision of the Tenth Circuit, and the holding of the Fourth Circuit in Bahen v. Wright 176 Fed. 2d 538, and the Seventh Circuit in United States v. P. F. Collier & Son Corporation, 208 Fed. 2d 936.

This Court should, therefore, grant a hearing to resolve the conflict in the circuits.

The Ninth Circuit Court apparently took the position that a corporation whose charter had lapsed for nonpayment of taxes was dead and could not do anything, basing it on a decision which this Court rendered in an Illinois case; but, the Court in *Watts v. Liberty*

Royalties Corporation, 106 Fed. 2d 944, (10th Cir.) distinguished that case from the Illinois case in pointing out that the Delaware law permits a revival of the corporation and all its powers by an application to be restored and the payment of taxes. Its corporation charter can be fully restored under Sections 312 and 510 of the Delaware Corporation Code relating to taxes, and see Title 8, Delaware Corporation Statute, Section 312.

See:

Watts v. Liberty Royalties Corporation, 106 Fed. 2d at 944.

This holding is in accordance with the cases decided by the State of Delaware itself which hold that a Delaware corporation is not actually dead because there has been a nonpayment of taxes, but that the charter is merely in a state of suspension which can be renewed at any time by the appropriate payment of delinquent taxes. (See Section 312, Delaware Corporation Code; *Wax v. Riverview Cemetery Co.,* 2 Terry 424, 41 Del. 424, 24 Atl. 431). The Delaware Court points out that the franchise tax is purely a revenue measure, and that the corporation can be resuscitated upon the payment of the taxes. The provisions of the Delaware statute permitting its reinstatement are purely remedial.

See also the following Delaware cases:

Harned v. Beacon Hill Real Estate Co., 9 Del. ch. 411, 84 A. 229;

Eastman, Gardiner & Co. v. Warren, 109 Fed. 2d 193 (5th Circ.).

In *Watts v. Liberty Royalties Corporation,* (10th Circ.) 106 Fed. 2d 944, the court allowed the bankrupt to proceed under Section 77B of the Bankruptcy Act, after more than three years after its charter had expired. This holding is in consonance with the purposes of the Bankruptcy Act to give full and exclusive jurisdiction to the Bankruptcy Court in the administration of bankruptcy estate and this, of course, includes the right to appeal and have its orders reviewed by the Court of Appeals and by this Court. Any other holding would destroy that right. See also *Troustone v. Bauer, Pogue & Co.,* 144 Fed. 2d 382.

In the case of *Watts v. Liberty Royalties Corporation* (10th Circ), 106 Fed. 2d 941, *seven* years had elapsed from the payment of taxes, yet that circuit permitted the corporation to proceed for re-organization under Section 77B of the Bankruptcy Act.

The equitable purposes of the Bankruptcy Act would be frustrated if a corporation whose assets had been taken over by the Trustee in Bankruptcy pursuant to that act could not proceed to be administered in the Bankruptcy Court because the Trustee failed or neglected to pay the state taxes of the state in which the corporation was chartered. Thus, in this case he could frustrate, and the effect is to frustrate, the rights of the corporation, one of his beneficiaries as resulting *cestui que* trust.

And, since all rights date from the date of bankruptcy and the Newport Corporation's tax situation in Delaware was valid as of the date of its adjudication in

bankruptcy, the bankruptcy is a proceeding within the meaning of the Delaware statute in which "all matters therein, until its conclusion, are necessarily exempted" under the provisions of the Delaware statute.

United States v. P. F. Collier & Son Corp., 208 Fed. 2d 936.

We respectfully submit that this is not only a highly important question in the law of Bankruptcy and corporate operations but also there is a conflict in the Circuits (between the Ninth Circuit and that of the Tenth Circuit, Fourth Circuit and the Seventh Circuit) which should be resolved by this Honorable Court.

II.

Another highly important question presented by this Writ is Whether the District Court Erred in Allowing Interest on all the Unsecured Claims from the date of the Commencement of Bankruptcy in 1935.

The amount of generally allowed claims against the bankrupt estate is $187,906.84. These claims were not passed upon nor allowed until 1952; yet the Referee allowed seven per cent interest per annum on these claims from the date of the bankruptcy in 1935—or $250,913.59.

The Chandler Act made no provision for the allowance of interest. The general rule has been that interest stops when bankruptcy commences. Congress, in advising and considering the Bankruptcy Act, had a

right to provide for or not to provide for interest, and Congress has made no provision in the Bankruptcy Act for any interest. Even in the case of the Government in tax claims, this Court has stated in a Bankruptcy proceeding, in *New York v. Saper*, that interest would not be allowed to the Government:

In *New York v. Saper*, 336 U. S. 328, 330, 93 L.Ed. 710, at 714, the Court said:

> "More than forty years ago Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied. *Sexton v. Dreyfus*, 219 U.S. 339, 344, 55 L.Ed. 244, 245, 31 S. Ct. 256, 25 Am. Bankr. 363. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary. Section 63(a) (1), 11 USCA §101(a) (1), 3 FCA Title 11, §103(a) (1) allows interest on judgments and written instruments only to date of bankruptcy. Section 63(a) (5), 11 USCA §103(a) (5), 3 FCA Title 11, §103(a) (5) allows interest only to that date on debts reduced to judgments after bankruptcy. No provision permits post-bankruptcy interest on other claims in general or tax claims in particular. Section 57 (j) 11 USCA §93 (j), 3 FCA Title 11, §93 (j) forbidding allowance of governmental pen-

alties or forfeitures, permits allowance of losses sustained by the act penalized, with actual costs and 'such interest as may have accrued thereon according to law.' However, on its face this appears to delimit even such allowable debts as of the date of bankruptcy and to allow no more interest than does §63 with respect to the claims there specified. Moreover, there is no interest except that which accrues according to law—it is exactly such interest that the 'fundamental principle' cuts off as to bankruptcy. Section 57 (n), 11USCA §93 (n), 3 FCA Title 11, §93 (n), requiring governmental claims to be provided in the same manner and within the same time as other debts and only for cause shown may a reasonable extension be granted. Tax claims are treated the same as other debts except for the fourth priority of payment, §64 (a), 11 PSCA §104 (a), 3 FCA Title 11, §104 (a), and the provision making taxes nondischargeable, §17, 11 USCA §35, 3 FCA Title 11, §35. But each of these sections is silent as to interest.

The long-standing rule against post-bankruptcy interest thus appears implicit in our current Bankruptcy Act. To read into such a statute an exception to that rule would be unwarranted and, as an original proposition, we should decline to do so. However, the issue comes here after forty years of bankruptcy administration under the Act of 1898 followed by ten years under the 1938 Chandler Amendments."

(336 U. S. 328, 330, 331, 332, 93 L.ed. 710, 714, 715).

The holding of the District Court is therefore in conflict with the decisions of this Court on the question of payment of interest, and also with *In re Silk* (2nd Circuit), 55 Fed. 2d 917; *Burton Coal Co. v. Franklin Coal Co.* (8th Circuit) 67 Fed. 2d 797.

No case has been cited, nor can be found, where an involuntary petition in bankruptcy brought against it by its creditors, permitted them thereafter to collect interest, after the corporation had been kept alive as a going concern and its obligations by reason thereof have been, and are being, met 100% on the dollar. A proceeding which would allow the creditors to collect 135% interest and deprive the corporation which has operated there 19 years to the successful tune of liquidating almost two million dollars of indebtedness of receiving anything as resulting *cestui que* trust would be inequitable and contrary to any Congressional intent or purpose.

But, even if interest would be allowable, it could only be allowable from May 1952, the date when claims first came up for and were passed upon. Until that date each claim was uncertain and undecided; it was subject to objections, and none of the claimants pressed their claim, nor were there hearings held thereon. A decision on a claim is a judicial act and the determination of its validity only makes it a judgment in the sense that interest may be paid on judgments after they are rendered and the amounts made fixed and certain in cases where interest is allowable.

Congress, however, has stated how claims should be filed; and, before any interest could be allowed on any claim, the claimant would have to make a claim for interest—none of which was done here. Thus, the Court by judicial fiat has granted an amount beyond that claimed by the claimants. Congress has not so provided. This would, in effect, be a penalty in an involuntary bankruptcy proceeding, which this Court has said is not appropriate. And see

Vanston Bondholders Protec. Com. v. Green, 329 N.S. 156, 163; 91 L.Ed. 166.

In *Vanston Bondholders Protec. Com. v. Green,* 329 U.S. 156, 163, 91 L.Ed. 166, the Court said:

> "But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles."

The Court there said:

> "When and under what circumstances federal courts allow interest on claims against debtors' estates being administered by them has long been decided by federal law. Cf. *Jackson County v. United States,* 308 U.S. 343, 84 L.ed. 313, 60 S. Ct. 285; *Royal Indem. Co. v. United States,* 313 U.S. 289, 85 L.ed. 1361, 61 S. Ct. 995. The general rule in bankruptcy and in equity receivership has been that interest on the debtors' obligations ceases to accrue at the beginning of proceedings. Exaction

of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved. Thus this Court has said: 'We cannot agree that a penalty in the name of interest should be inflicted upon the owners of the mortgage lien for resisting claims which we have disallowed. As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate.' *Thomas v. Western Car. Co.*, 149 U.S. 95, 116, 117, 37 L.ed. 663, 670, 671, 13 S. Ct. 824. Cf. *American Iron & Steel Mfg. Co. v. Seaboard Air Line R. Co.*, 233 U.S. 261, 58 L.ed. 949, 34 S. Ct. 502. Courts have felt that it would be inequitable for anyone to gain an advantage or suffer a loss because of such delay."

Congress, in fixing how claims shall be filed, has not provided for interest on unsecured claims, nor for payment of any amounts in excess of the claims. Where a claim is a secured claim, generally, the instrument itself provides for interest and the claimant files his claim pursuant to his secured instrument. But, here, all of the claims on which interest was allowed were, and are, unsecured claims and were not considered or allowed until May 1962. Yet the Court reverted inter-

est back to the date of the commencement in bankruptcy.

Even under state law, a claim or suit for money would not bear interest until reduced to a judgment. Therefore, in any event, the claims would not be entitled to interest equitably or otherwise until they had been reduced by a judicial act to a specified allowed amount. We think even this allowance, if it was to be had and on unsecured claims, was the problem of Congress and not the Court. In those few cases in which interest has been allowed the proceedings were voluntary bankruptcy proceedings and not involuntary, and not in any case where the corporation has been permitted to do business over a period of years by the District Court in order to enable the corporation or debtor to come out whole, as in this case. Any earlier liquidation woud have cut the claims of the creditors far below their receipt of 100 cents on the dollar.

This question is a very important question in the administration and interpretation of the bankruptcy law, which this Court should determine with finality by the granting of the writ of certiorari.

III.

The Third important point to be decided in the administration of Bankruptcy in connection with this appeal is Whether a Proposed Plan of Re-organization Under Chapter X, which is submitted to the District Court, may be Summarily, and Without Notice, Dismissed Under a Local Rule Without Being Passed Upon by the District Court in Accordance with the Provisions of Section 141 of the Bankruptcy Act, (11 U.S.C. §§541-549).

That section provides that upon the filing of the petition by a debtor, the judge shall enter an order approving the petition is satisfied that it complies with the requirements of this Chapter and has been filed in good faith, or dismissing it is not so satisfied. The Court did not dismiss the petition because it did not comply with the requirements of the chapter or was not filed in good faith, but dismissed it summarily and without notice to the debtor, and without a hearing thereon, because it did not comply with a local rule of the Bankruptcy Court. The plan was one that would have protected and benefitted the debtor corporation and its stockholders. The summary dismissal of the proposed plan thus allowed the specialized sale to proceed.

In *Re Equitable Office Building Corporation, Debtor*, 96 L.Ed. 1386, at 1390, Mr. Justice Reed stated:

> "A court of reorganization guards with equal solicitude the *equity of stockholders* and the priority of creditors." (Emphasis ours.)

Here, the summary dismissal of the Chapter X petition, without notice or without hearing, and without compliance of Section 141 of the Bankruptcy Act, deprived the equity of stockholders of that "equal solicitude" guaranteed by the Bankruptcy Act.

And, the allowance of interest from the date of bankruptcy equally failed to guard the equity of the stockholders in this case.

IV.

Another reason for granting the Writ is to determine the Important Question of Federal Law as to the Amount of Notice that Should Be Given upon the Sale of Properties of this Character.

We point out the factual situation briefly, we point up the importance of the question which was erroneously decided by the District Court and appeal summarily denied by the Court of Appeals.

After 19-years of operations as a going concern, with permission of the Court, (B.A. §202(a) (5), until May 26, 1952), an order of liquidation was entered by the Referee in Bankruptcy, Referee Dickson, which order was confirmed on review by Judge Paul J. McCormick, on November 28, 1952. The order of Referee Dickson directed the Trustee "to proceed with all due diligence to sell the assets of said estate to the end that the assets of said estate may be speedily converted into money, the expenses of administration paid, the residue paid to the creditors as required by law, and the estate

closed." This order was made after almost two million dollars in indebtedness had been paid off or cleared from the estate.

Trustees Metcalf and Sampsell respectively, engaged in the business of leasing oil properties, inspecting their operation and collecting various kinds of income therefrom. While operating that business, they paid federal and state income tax. (*U. S. v. Metcalf*, 131 Fed. 2d 677). On February 11th, 1953, A. S. Menick, an appraiser appointed by the Court, filed his appraisement and on September 21st, 1953, A. A. Carrey filed his appraisement of oil royalties out of the lands of the estate at Long Beach, and on November 17th, 1953, A. S. Menick and H. A. Sheedy filed their appraisement of a parcel of land in Tulare County and acreage in the Verdugo Woodlands Tract in the City of Glendale, and real estate in Long Beach, out of which the oil royalties arose. The total appraisement of these court appointed appraisers was $604,910.00. Mr. Newport, a real estate operator for many years, appraised the properties at $800,000.00.

On November 3, 1953, Trustee Sampsell filed his petition for authority to sell and for confirmation of sale of real and personal property to R. T. Colter, a married man, represented by Wm. Neblett, formerly the attorney for the Newport Corporation but now representing interest adverse to the corporation. Colter's bid was for $350,564.15. The petition prayed that the time and place be set for a hearing according to law, and that at the hearing an appraisement of all

real and personal properties be made and presented to the Court at the hearing thereof.

The offer of Mr. Colter was conditioned on his receiving all the oil and other income during the pendency of the proceedings and subsequent to the confirmation of the bid. The oil royalties alone are $3500.00 per month, or $42,000.00 annually. On May 26th, 1952 the trustee possessed $47,285,19 in oil royalties alone. Judge McCormick declined to confirm the bid, but instead referred the matter back to the referee as not being a firm bid within the meaning of the law and referred the matter to the referee to conduct further formal hearing and endeavor to procure a "firm, positive, definite and certain bid for the property pursuant to the Bankruptcy Act" and in such manner as to his judgment would be for the best interests of the estate. The order of Judge McCormick terminated the hearing on an effort to confirm the bid and it became a dead matter and required a new proceeding with new notice and new hearing as to the value of all the assets, special conditions attached, the possibility of paying off the obligations from monies already received, the possibility of Tulare County properties being cotton producing, the value of the Verdugos Woodland property as subdivision property.

The Referee, however, treated the matter as a continuing one, and without holding any hearings thereon, considered an amended bid by Colter, which written offer was as follows:

"R. T. Colter hereby amends his offer to purchase all of the properties, both real and personal, of F. P. Newport Corporation, Ltd., a bankrupt, which offer is the subject of the petition for confirmation of November 3rd, 1953. (Petition page 7, lines 11-15).

Several creditors filed their written objections. These objections were set forth in fifteen separately numbered paragraphs, which were overruled.

The Eighth Circuit, in *Bovay v. Townsend,* 78 Fed. 2d 343, lays down the rule: "We are of the opinion that the sole power of the court lay in either approving the sale or in setting it aside and ordering another sale upon proper statutory notice." (*Bovay v. Townsend,* 78 Fed. 2d 343, 346). The opinion of the Court of Appeals for the Ninth Circuit is in conflict with this decision, holding that it was unnecessary.

The new bid of Colter merely again reiterated his former bid at the identical price, but waived the demand for the cash accruing after August 18th, 1953, in the hands of the trustee, "from oil and the sale of other properties."

Although the first sale was advertised in two Los Angeles metropolitan newspapers, no advertisement of any character was placed in any of the daily city newspapers, but a small ad with inconsequential legal descriptions was placed in the Los Angeles Daily Journal, a legal newspaper with 4000 circulation among lawyers and judges.

Whether this was a new sale requiring new notice and new advertising of a character sufficient to attract substantial buyers and bring in much larger returns beneficial to the resulting *cestui que* trust, are important questions to be determined in the administration of the bankruptcy act.

V.

An important question of Bankruptcy Law is involved as to Whether the Rejection of the Sale or Re-referal to the Referee Requires New Bidding and New Advertising, and Whether in the Absence of Such Advertising to the Public, to the Creditors, to the Stockholders and Others, the Court had Jurisdiction to Make the Sale or to Have the Sale Confirmed at which COLTER had Bid Before But Without Condition.

There was no advertising of the new sale in the local newspapers; no hearing was held on the increase in value, and objections which were made to the Referee were quickly overruled.

Although the Colter bid was amended to purchase the property without condition that he was to receive all the income from the royalties of the oil and other incomes subsequent to the sale, on the rehearing the sale was again made to him as of the date of the sale; thus, allowing him to collect all of the oil royalties and other income during the reviews and appeal. There was a deposit in connection with the Colter bid of

$40,700.00 as a guarantee. The oil royalties alone are and have been paying approximately $3500.00 per month, or in excess of $42,000 per annum.

The new bid was accepted by another Referee and the confirmation was by another District Judge, without however any order setting up a new hearing date, advertising a new hearing, and advising the public generally; and, while the other order of confirmation, which had not been confirmed, was not set aside during these proceedings. It was only after the conclusion of these proceedings that the order of Referee Dickson, of December 9th, 1953, under review by Judge Paul J. McCormick (never confirmed) was vacated and set aside. The Referee and the District Court were therefore without jurisdiction to hear and determine the amended and supplemental petition of the trustee without calling a new hearing, without new notice on the new hearing, and without appropriate advertising.

The judgment and order, therefore, making a sale on an amended offer, without appropriate notice and without hearing thereon, is null and void as violative of the due process claims of the Fifth Amendment and the procedural sections of the Bankruptcy Act, Sections 58 and 59.

Bovay v. Townsend (8th Cir.) 78 Fed. 2d 343. Until this was done, the Referee did not have jurisdiction to hear and determine the amended and supplemental petition of the Trustee, or to vacate and set aside the order of another referee. The proceedings, therefore, were a nullity and void and should be set aside.

(See also Section 58 of the Bankruptcy Act, Title II, Chapter 6, Section 94).

The fundamental requisite of Due Process of Law is the opportunity to be heard fully upon due notice to all parties and to the public.

City of New York v. New York, New Haven & Hartford R. R. Co., 344 U. S. 293, 97 L. Ed. 333;

Grannis v. Ordean, 234 U. S. 385, 58 L. Ed. 1363;

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865.

In the case of *New York v. New York, N. H. & H. R. Co.,* 344 U. S. 293, at 297, the court said:

> "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."

In that case the court held that the mere fact that the City of New York might have had knowledge did not remove the statutory command for appropriate notice.

And, in this case, no notice of a new hearing was called for; no additional testimony was called for, and merely a hearing on the proposed amended bid, which was not a compliance with the Bankruptcy Act nor its purposes.

The first sale was completely advertised in two Los Angeles daily newspapers, but the last one was only

advertised in a small and uninformative ad in the Los Angeles Daily Journal, a legal newspaper which goes to lawyers and judges, but did not state any of the terms and conditions of the proposed new hearing, in any detail, nor any full or appropriate descriptions of the properties that were to be involved.

The Trustee in this case did not publicize the proposed sale, and the advertising was totally inadequate to apprise the public of what was being sold in that the locations of the land were not given except in a most general sense, and the oil royalties were only described in a like manner with no reference to its income or potentialities, and these descriptions were commingled with personal property offered and described as "sundry personal property with other assets" and only as miscellaneous scattered properties.

Such descriptions have been held to be wholly inadequate to apprise the public of what was being sold.

In Re Irvine, 255 Fed. 168;
In Re Champlain Pulp & Paper Co., 20 Fed. 2d 245.

Actually the properties involved in this case were highly valuable properties, the oil producing alone $3500.00 per month, or $42,000 annually. Verdugo Woodlands acreage is located in an exclusive area and highly valuable for subdivision purposes, and persons known to be fairly responsible financially were negotiating for the purchase of 40-acres of the 180-acre tract for that purpose.

Title 28, Section 2002 says:

> "A public sale of realty or interest therein under any order, judgment or decree of any court of the United States shall not be made without notice published once a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in the county, state, or judicial district of the United States wherein the realty is situated."

While Congress has not made this section applicable to Title XI, yet it has stated what it considers to be adequate notice in a public sale, and that there should be at least an advertisement in a newspaper regularly issued and of general circulation for at least four consecutive weeks prior to the sale.

There was no specific advertisement of the new hearing except the small ad appearing in the Daily Journal, a newspaper with a circulation of about four thousand copies daily in a city of a population of over two million, and a county of a population of over four million persons, and in a judicial district of perhaps in excess of five million people, many of whom are interested in oil development and investments and in real estate and housing.

VI.

Another important question to be decided by this Honorable Court is: Whether the District Court Erred in Authorizing and Directing the Sale of the Entire Properties in Solido rather than in Separate Parcels.

This estate might be divided into four separate categories:

1. The oil bearing properties located at Long Beach, California with an income of approximately $3500.00 per month, or $42,000.00 per annum;
2. The Verdugo Woodland Hills acreage consisting of 227 acres in the exclusive area of Glendale, California, available for exclusive subdivision property of the high quality and character;
3. The Tulare County land with its possibility of cotton production, and
4. The cash and income stored with the Trustee in its collections from the oil wells and properties.

A sale of the separate and diversed units to be far more profitable and beneficial to the estate than a sale in *solido*. It is like mixing oil and water and asking a buyer who wants oil to buy the water too, or visa versa.

The question as to whether the court and the trustee did not abuse its discretion is an important one in the administration of bankruptcy law.

VII.

Another important question raised by this petition is: Whether the Bankrupt Corporation is an aggrieved party within the meaning of the Bankruptcy Act, entitling it to Appeal, and to be represented by Counsel of its Choice.

Of course, where the bankrupt is the resulting *cestui que* trust and has a substantial reversionary interest in the estate, as it would have if this Court determined that the interest paid to the unsecured creditors dating back to 1935 is not allowable, the bankrupt has a substantial interest and, of course, has the right to be represented and is an aggrieved party as designated by the Bankruptcy Act, just as in Probate Estate any party who may have a substantial interest or claim by relationship, or otherwise, in the estate into any possible funds is an interested party and is aggrieved by any decision adverse to it.

VIII.

Another important question for consideration on review is: Whether the Order to Sell En Masse Stifles Competition and is not Equitable in the Circumstances Because it Would be a Needless Sacrifice of the Debtor's Property, Which is Subject to a Division, and a Smaller Portion of the Sale of the Property Would Satisfy the Debt.

In Re Haywood Wagon Co., (C. C. A. 2), 219 Fed. 655.

In the instant case the unsecured creditors could have been paid off in full on the amount they claimed of $187,000.00. The corporation could then have been discharged and declared solvent, and continued its existence even without a Chapter X proceeding. It was entitled to such treatment on equitable principles, having met all of its obligations 100 cents on the dollar. Separate sales, if so advertised, could have brought substantially more money, also.

The objections and the questions thus presented were considered on their merits by the Referee and the trial court on the presentation of the bankrupt. There is no reason why they should not be considered on review by this Court.

IX.

Another point raised by this appeal is: Whether the Proceedings Had in this Case were Proper and Lawful and Permitted under the Bankruptcy Act and were in Accordance with Law, where the District Court Declined to Confirm the Action of the Referee of December 9th, 1953 and Re-referred the Matter to the Referee, holding that the bid which had been confirmed was "not a firm bid within the meaning of the law" (Tr. 1, lines 13, 14), and Whether it was Necessary for the Referee to hold a New Sale and Conduct a Formal Hearing Before the Court in Accordance with the Court's Previous Order and Endeavor to Determine the Best Manner in which the Court Appraised $604,325.00 of Remaining Assets Can Be Best Disposed of, Including an Investigation as to any Special Value that May Exist in All the Properties, including those in Tulare County as to the Growing of Cotton and into the Verdugo Woodland Acreage Because of the Present Demand for Subdivision Purposes or Other Purposes, and as to the Value of the Oil Lands and Oil Income.

No such hearing was held by the Trustee, but instead the Trustee accepted an identical bid but waiving the demand for the cash accruing after August 18th, 1953.

Without any hearing, and without any evidence as directed by the District Court, another Referee merely conducted a purported sale of the assets in which the

original bidder again received the property but at a higher price as of the date of the sale, but still reserving to himself all the oil accumulations and increment during the time the appeal is pending, and thus not being a firm bid without any strings to it.

We submit that the second Referee had no jurisdiction to set aside the bid of the first referee and to conduct a sale while the first bid was still pending, and without holding the hearings and having a new and complete investigation and a new and complete sale, in accordance with the first District Judge's direction.

Procedurally, this presents an important question of Bankruptcy Law which has not been but should be determined by this Honorable Court.

X.

Another question presented by this appeal is: Whether the Sale was Necessary at All and in the best interest of the Estate. It was not necessary to sell $604,325.00 of Court appraised assets in order to pay creditor's claims in the sum of $187,123.88, and remaining expenses of administration.

It is obvious that with an income of at least $3500.00 a month from oil alone the unsecured creditors could be paid off out of income, and if any portion of the subdivsion real estate sold they could have been paid up one-hundred cents on the dollar. To order a sale and conduct a sale when the corporation is so close to being fully cleared was and is inequitable. The Trustee

should have been compelled, in the interest of the corporation, to submit a Plan of Arrangement or to carry on and complete the payment of creditors rather than liquidate the assets.

XI.

Another question presented by this appeal is: Whether the Sale as Conducted through the Attorney for the Purchaser, who was formerly the attorney for the Bankrupt Corporation, Does Not Present a Question of Fraud on its Face so as to Nullify the Sale.

Wm. H. Neblett was the attorney for the corporation from its outset. He appeared as attorney of record for the corporation. At that time he was a law partner of the late Senator William Gibbs McAdoo and by reason thereof wielded considerable influence. He was then in a confidential relationship with the corporation at all times and in a position of influence in this matter. Since that time he has been and is acting adversely to that of his client and he represented and is purportedly representing Colter, but according to his affidavit a syndicate headed by Colter in the purchase of the Newport assets.

An attorney for the Bankrupt is bound in all matters to act in the highest good faith toward his beneficiary, or client or former client, and may not obtain any advantage therein over the latter by his former confidential position, which results in his own profit. His interest, adverse to that of his former client, taints the whole transaction as inequitable and improper.

Schroeder v. Young, 161 U. S. 334, 40 L. Ed. 721;
Byers & Surget, 19 How. 303, 15 L. Ed. 670.

Such a purchase by the syndicate headed by Neblett or represented by him cannot be a bona fide purchase.

Gay v. Parpart, 106 U. S. 679, 27 L. Ed. 256.

The court has a duty to look behind the whole sale and determine whether the corporate interest is injured.

Pepper v. Litten, 308 U. S. 295, 84 L. Ed. 281.

An attorney can in no case, without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates.

Baker v. Humphrey, 101 U. S. 494, 25 L. Ed. 1065.

We think the same principle should apply where the attorney has represented the client. (See *Schroeder v. Young,* 161 U. S. 334, 40 L. Ed. 721 and *Marsh v. Whitmore,* 21 Wall. 178, 22 L. Ed. 482.

XII.

Another question presented by this appeal is: Whether the Circuit Court should not have remanded the case to the District Court for the purpose of taking further testimony upon the allegation that a fraud was perpetrated on the District Court in the Sale.

The motion was based upon the fact that the Referee during the conduct of the sale required the potential buyers to qualify as "qualified buyers." Representations were made to the court that R. T. Colter was the actual purchaser of the property and that he was a "qualified buyer" and had assets himself to pay the full amount. That the very time the hearings were held and a confirmation of the order of sale was made, R. T. Colter was not physically or mentally qualified to carry on negotiations for the purchase, nor was there any present intention on his part actually to make the purchase of the properties himself and complete the same. (R. 647). This was a fraud upon the court which required each potential buyer to be the person who intended to buy and to qualify as such purchaser.

It was also represented to the Referee that Mr. Colter did not plan to pay the sum of $407,000.00 through the sale of certain of these assets. (R. Tr. 120, 121).

The affidavit in support of the motion alleged that at the very time of the motion Mr. Colter was then 82 years of age; had recently been operated on for a brain tumor, and was in no condition to carry on such physical activities.

The answering affidavit, prepared by Mr. Wm. Neblett, the former attorney for the Newport Corporation, admitted that the deal was not made by Colter individually but by a syndicate (supposedly) headed by Mr. Colter and that the purchase was being made by "several syndicate members" (R. 695); and he says, since the sale was concluded another attorney is representing the "syndicate."

Since the sale was not made to a qualified buyer in accordance with the order of the Referee but juggled around for a syndicate represented by the former attorney for the Newport Corporation, the cause should have been remanded to the District Court for the investigation of whether the transaction was fraud upon the court.

Where there is a fraud upon the court it vitiates the transaction and should be thoroughly examined by the Court. And, where the court qualifies a specified buyer, the sale must be conducted in accordance with that order. Any other procedure is unfair to the other bidbers and to the appellant and is misleading.

Misstatements to the court are a fraud upon it.

United States v. Gilliland, 312 U. S. 86, 85 L. Ed. 598.

Fraud vitiates everything.

People v. Iseman, 78 Cal. App. 223.

And, where a procedure has been fraudulent, the court has power to remand the case for the taking of further

testimony or the setting aside of the proceedings in the District Courts.

Title 28, Section 2106 U. S. Codes;
Arkansas Valley Smelting Co. v. Mining Co., 127 U. S. 379;
Sisters of Notre Dame v. Kusmitt, 125 Md. 323, L. R. A. 1916D 792.

We submit that such proceedings present an important question of Bankruptcy Law which this Court should pass upon.

XIII.

Another question of importance is: Whether the Sale was Fair and Equitable to the Stockholders.

As Mr. Justice Reed said in *In Re Equitable Office Building Corporation,* Debtor, 96 L. Ed. 1386, at 1390:

> "A court or reorganization guards with equal solicitude the equity of stockholders and the priority of creditors."

The same principles should apply in this case, but no consideration was given to the interest or the equity of the stockholders.

The purported sale should, therefore, have been referred back to the District Court for the taking of further testimony to determine if it was in compliance with its orders or whether a fraud had been perpetrated upon it, and the Circuit Court erred in denying the motion.

We respectfully submit that all of these questions are highly important in the administration of, and in fair administration of, the bankruptcy laws and represent not only questions of importance which this Court should pass upon, but also represent questions of conflict between the Circuits which should be resolved by this Court.

After 19 years as a going concern, this corporation should not have been liquidated to the oblivion of any benefits of its stockholders and the corporation itself. Congress has repeatedly passed laws since 1933 to protect landowners to wit Sections 74 and 77B of the Bankruptcy Act and Chapter XII of the Act. While the latter does not apply to corporate landowners, the intent and spirit of Congress in these various enactments, should apply to this substantial corporate landowner, who should not be wiped out after payment of $2,000,000 indebtedness. Reorganization, not liquidation, should be permitted. Fantastic allowances of interest at this time should not be permitted. Failure of the trustee to pay the franchise tax of the State of Delaware should not rob petitioner of his day in court on the merits of his rights. He should have his day on appeal on the merits. We, therefore, respectfully pray that this Honorable Court grant certiorari and reverse the judgment and orders below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT
Nov. 12, 1954.

F. P. NEWPORT CORPORATION, Limited, Appellant,
vs.
PAUL W. SAMPSELL, Trustee in Bankruptcy of the estate of F. P. Newport Corporation, Limited, et al., Appellees.

No. 14572

Appeal from the United States District Court for the Southern District of California, Central Division; Paul J. McCormick, Judge.

Morris Lavine, Los Angeles, Cal., for appellant.

Norman A. Bailie, Richard A. Turner, Bailie, Turner, Lake & Sprague, Los Angeles, Cal., for appellee.

Before MATTHEWS and ORR, Circuit Judges, and WIIG, District Judge.

PER CURIAM.

This purports to be an appeal by F. P. Newport Corporation, Limited, bankrupt, from a judgment affirming an order of a referee in bankruptcy. In re Newport Corp., D.C.S.D. Cal., 123 F. Supp. 95. In this court, two motions have been filed—(1) a motion of Paul W. Sampsell, trustee in bankruptcy, to dismiss the purported appeal and (2) a motion purportedly filed by the bankrupt to vacate the judgment and remand the case to the District Court. The motion to vacate and remand is denied. The motion to dismiss is granted, and the purported appeal is dismissed.

APPENDIX B

PAUL W. SAMPSELL, TRUSTEE IN BANKRUPTCY
for F. P. NEWPORT CORPORATION, LTD.

STATEMENT OF RECEIPTS AND DISBURSEMENTS
INCLUDING RECEIPTS AND DISBURSEMENTS DURING RECEIVERSHIP
MARCH 23, 1935 to JANUARY 31, 1955, INCLUSIVE

RECEIPTS	
Oil Income and Royalties	$1,279,[illegible].63
Sales of Real Estate—Miscellaneous Lots	[illegible].[illegible]
—San Fernando Valley Property	[illegible].[illegible]
—Verdugo Park and Acreage	[illegible].[illegible]
—40 Acres—U. S. Government	[illegible].[illegible]
—Crescenta Oaks—Tract 9697	[illegible].[illegible]
—State Highway Dept.—Freeway Deal	[illegible].[illegible]
—9 Acres Deal—Lot 20, Rs. Los Cerritos	[illegible].[illegible]
—Waterfront—Compromise Deal	[illegible].[illegible]
—Deposit—All Assets	[illegible].[illegible]
Rentals	[illegible].[illegible]
Interest Collections	[illegible].[illegible]
Taxes	[illegible].[illegible]
Sales of Equipment	[illegible].[illegible]
Notes Receivable	[illegible].[illegible]
Sale of Drew Judgment	[illegible].[illegible]

—Covenants Onko—Trust 8847		45,500.00
—State Highway Dept.—Freeway Deal		25,425.00
—9 Acres Deal—Lot 28, Rn. Los Cerritos		47,600.00
—Waterfront—Compromise Deal		222,042.67
—Deposit—All Assets		40,700.00
Rentals		99,503.69
Interest Collections		6,900.44
Taxes		3,726.65
Sales of Equipment		1,543.92
Notes Receivable		900.10
Sale of Drew Judgment		10,000.00
Miscellaneous Income		3,698.91
TOTAL INCOME		$2,665,407.83

DISBURSEMENTS

Payment on Property in Trust			
Principal—Paid in Cash	$1,116,071.21		
—Paid in Property	222,042.67		
Interest Paid	356,198.53		
Taxes	267,424.51		
Street Improvement Bonds—Principal	6,521.19		
—Interest	611.53		Security First
Oil Lease and Dehydration	62,074.85		National Bank
Atty. Fee—Wm. H. Neblett—Waterfront	7,500.00		
Settlement—City of Long Beach	5,830.90		
Bank Fees—Deeds, Leases, Notary, etc.	612.01		
Tax Refund Claims—Trust Properties	96.26		
TOTAL PAID ON PROPERTY IN TRUST	$2,044,983.66		
Taxes Paid—Property Outside Trust		42,384.66	
—Income Tax—Federal and State		59,258.38	
Interest Paid on Income Tax		18,525.63	
Salaries—F. P. Newport to Nov. 30, 1943		25,466.62	
—Bookkeeper and Stenographer		49,551.50	
Agents Commissions		23,269.98	
Bankruptcy Fees and Expenses		197,247.35	
Rent		16,300.00	
Street Improvement Bonds—Principal		2,155.57	
—Interest		695.99	
Property Upkeep—Park, Ranch, etc.		15,852.98	
Mileage Expense—Property Inspection		5,147.40	
Advertising		3,642.02	
Title Expense		5,623.69	
Trust Deeds, Claims and Interest Paid		53,398.19	
Other Expenses		28,367.94	
TOTAL DISBURSEMENTS			2,591,870.56
BALANCE ON HAND—JANUARY 31, 1955			$ 73,537.27
Distribution—General Trustee Fund		$ 14,672.88	
—Sale Impound Fund		18,164.39	
—Sale Deposit Fund		40,700.00	
		$ 73,537.27	

SUBJECT INDEX

PAGE

Reasons for denying the writ 2

Correction of erroneous statements in petitioner's statement of the case, and statement of additional facts 4

The Delaware statutes do not confer on a bankrupt corporation whose charter has become void, the right to appeal from an order authorizing and confirming the sale of the remaining unliquidated assets of the bankrupt corporation made pursuant to a final order of liquidation 14

A dissolved and defunct corporation is without right or power to do any act necessary to effect a valid appeal from an order authorizing and confirming a liquidating sale of remaining assets, exclusive of cash, under a final order of liquidation; and the same rule should apply to every bankrupt, natural or corporate 32

The remaining assets of the bankrupt estate are insufficient to discharge the approved unsecured and unpaid claims, the interest due thereon, and the remaining costs, fees and expenses of administration 38

Petitioner in its Point III, page 45, of its petition for writ of certiorari, relative to the dismissal of petitioner's proposed plan of reorganization under Chapter X, is not well taken for two reasons, namely, (1) the purported appeal herein involved does not purport to be an appeal therefrom, and (2) the order of dismissal has long since become final 47

Petition's contention under Point VI, page 55 of its petition for writ of certiorari to the effect that the District Court erred in directing a sale in Solido rather than in separate parcels, has no foundation upon which to rest 48

The bankrupt was not in anywise injured (1) by the fact that Mr. Neblett represented Mr. and Mrs. Colter on the purchase of the unliquidated assets; or (2) by the fact, if it be a fact, that Mr. and Mrs. Colter were acting for themselves and as the undisclosed agent for one or more associates 48

Conclusion 50

TABLE OF AUTHORITIES CITED

CASES	PAGE
Berl v. Crutcher, 60 F. 2d 440	33
Big Sespe Oil Co. v. Cochran, 276 Fed. 216	27
Fidelity Metals Corp. v. Risley, 72 Cal. App. 2d 377	7, 32
Gardner, Trustee v. State of New Jersey, 329 U. S. 565, 91 L. Ed. 504	45
Greva v. Rainey, 2 Cal. 2d 338	42, 43
Gross v. Irving Trust Co., 289 U. S. 342, 77 L. Ed. 1243	30
Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 411, 84 Atl. 229	29
Higgins to Use of Wil. & Reading R.R. Co. v. Downward & Sons, 8 Houst. 227, 14 Atl. 720, 32 Atl. 133	27
Johnson v. Norris, 190 Fed. 459	46, 47
Kiyoichoi Fujikawa v. Sunrise Soda Water Wks. Co., 158 F. 2d 490; cert. den., 331 U. S. 832, 91 L. Ed. 1846	43
Local Loan Co. v. Hunt, 229 U. S. 294, 78 L. Ed. 1230, 93 A. L. R. 195	30
People v. American Loan & Trust Co., 172 N. Y. 371, 65 N. E. 200	43
People v. Merchants' Trust Co., 187 N. Y. 293, 79 N. E. 1004	43
Rosenberg v. Lawrence, 10 Cal. 2d 587	50
Ruckel v. Metropolitan Life Ins. Co., 240 Pac. 409	33
Sawilowsky, In re, 284 Fed. 975	32, 33
Settem, In re, 118 Fed. Supp. 897	33
United Rifle Corp. v. Johnson, 41 Fed. Supp. 86	27
United States v. Metcalf, 131 F. 2d 677	28
Whitney, as Trustee in Bankruptcy of Dresser & Co. v. Emma B. Dresser, 200 U. S. 532, 50 L. Ed. 584	44

RULES

	PAGE
Bankruptcy Rules of the United States District Court for the Southern District of California, Rule 218, pars. (a), (b)	47
Federal Rules of Civil Procedure, Rule 17, par. (b)	7
Federal Rules of Civil Procedure, Rule 83	47
Rules of the United States Supreme Court:	
Rule 19(b)	2
Rule 23, par. (i)	3
Rule 23, par. 4	3
Rule 24	2
Rule 31, par. 2	3

STATUTES

Bankruptcy Act, Sec. 70a	32
Bankruptcy Act of 1938, Sec. 47	51
Bankruptcy Act of 1938, Sec. 64	6
Delaware Code (new), Title 8, Chap. 1, Subchap. XII, Sec. 312	16
Delaware Code (new), Title 8, Chap. 1, Subchap. XII, Sec. 314	16
Delaware Code (new), Title 8, Chap. 5, Sec. 512	14, 25
Delaware Code (new), Title 8, Chap. 5, Sec. 513	13, 14, 25, 28
Delaware Franchise Tax Law, Sec. 71	14
Delaware Franchise Tax Law, Sec. 72	15
Delaware Franchise Tax Law, Sec. 73	15
Delaware Franchise Tax Law, Sec. 74	16
Delaware General Corporation Law, Sec. 42	17
Delaware General Corpoartion Law, Sec. 43	17
Delaware General Corporation Law, Sec. 44	17
Delaware General Corporation Law, Sec. 45	18
Delaware General Corporation Law, Sec. 46	19
Delaware General Corporation Law, Sec. 74	24

PAGE

Delaware General Corporation Law, Sec. 75 24
Delaware General Corporation Law, Sec. 77 24
Delaware General Corporation Law, Subchap. X, Sec. 281 ..... 16, 26, 27
Delaware General Corporation Law, Subchap. X, Sec. 282 ..... 16, 26, 27
Delaware Laws of 1941, Vol. 43, Chap. 132 17
Delaware Laws of 1945, Vol. 45, Chap. 158 24
Delaware Laws of 1951, Vol. 48, Chap. 353 17
Delaware Revised Code of 1935, Chap. 6, Sec. 105 14
Delaware Revised Code of 1935, Chap. 6, Sec. 106 15
Delaware Revised Code of 1935, Chap. 6, Sec. 107 15
Delaware Revised Code of 1935, Chap. 6, Sec. 108 16
Delaware Revised Code of 1935, Chap. 65, Sec. 2074 17
Delaware Revised Code of 1935, Chap. 65, Sec. 2075 17
Delaware Revised Code of 1935, Chap. 65, Sec. 2076 17
Delaware Revised Code of 1935, Chap. 65, Sec. 2077 18
Delaware Revised Code of 1935, Chap. 65, Sec. 2078 19
Delaware Revised Code of 1935, Chap. 65, Sec. 2106 24
Delaware Revised Code of 1935, Chap. 65, Sec. 2107 24
Delaware Revised Code of 1935, Chap. 65, Sec. 2109 24
Delaware Revised Code of 1935, Sec. 278 ..... 16, 25, 27, 28, 29, 31
Delaware Revised Code of 1935, Sec. 279 ..... 16, 26, 27
Delaware Revised Code of 1935, Sec. 280 ..... 16, 26, 27
Delaware Revised Code of 1935, Sec. 510 ..... 14, 25
Delaware Revised Code of 1935, Sec. 511 ..... 14, 25
General Order 56 47
Revenue Act of 1938, Sec. 52 28

PAGE

United States Code, Title 11, Chap. 5, Sec. 75 ..... 7, 51
United States Code, Title 11, Chap. 6, Sec. 94(a) 30
United States Code, Title 11, Chap. 6, Sec. 94(a)(4) 11
United States Code, Title 11, Chap. 7, Sec. 104 6
United States Code, Title 11, Chap. 7, Sec. 110 32

TEXTBOOKS

6 American Jurisprudence, Sec. 26, p. 569 30
6 American Jurisprudence, Sec. 494, pp. 840-841 41
12 California Jurisprudence, Sec. 62, p. 800 49
Treadwell's Constitution of California, Art. XX, Sec. 22 40

IN THE

Supreme Court of the United States

October Term, 1954

No. .....

F. P. NEWPORT CORPORATION, LTD.,

Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., Bankrupt,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice Earl Warren, and to The Honorable Associate Justices of the Supreme Court of the United States:

Respondent, Paul W. Sampsell, as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., presents his brief in opposition to the petition of the bankrupt for a writ of certiorari herein, and in support of an order denying said writ.

Reasons for Denying the Writ.

Pursuant to the provisions of Supreme Court Rule 26, respondent hereby designates the following matters and grounds why the cause should not be reviewed by the Supreme Court of the United States:

1. The Ninth Circuit Court of Appeals has not rendered a decision in conflict with the decision of another court of appeals in the same matter.

2. The Ninth Circuit Court of Appeals has not decided an important state or territorial question in a way in conflict with applicable state or territorial law.

3. The Ninth Circuit Court of Appeals has not decided an important question of federal law, which has not been, but should be, settled by the Supreme Court of the United States.

4. The Ninth Circuit Court of Appeals has not decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States.

5. The Ninth Circuit Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings, nor so far sanctioned such departure by a lower court, as to call for an exercise of the power of supervision vested in the Supreme Court of the United States. (See Sup. Ct. Rule 19(b).)

6. Petitioner has failed to present with accuracy, brevity and clearness facts essential to a clear and adequate understanding of the points which petitioner claims require the consideration of the Supreme Court of the United States.

7. That many of the purported facts stated in the petition for writ of certiorari herein are inaccurate and misleading, and do not serve to give to the Supreme Court of the United States "whatever is essential to a ready and adequate understanding of the points which petitioner claims require consideration by this court." (See Sup. Ct. Rule 38, par. 6.)

8. The petition for writ of certiorari filed herein is not "prefaced by a motion for leave to file such petition" as required by Supreme Court Rule 38, paragraph 1, nor has any such motion and petition been served on respondent as required, and the petition filed herein does not "set forth with particularity why the relief sought is not available in any other court or cannot be had through other appellate processes," as required by Supreme Court Rule 38, paragraph 5.

9. The petition for writ of certiorari does not (as required by Supreme Court Rule 38, paragraph (1), have appended thereto (1) the (a) memorandum opinion and (b) supplement thereto of Referee Hunt; nor (2) said Referee's findings of fact, conclusions of law and order authorizing and confirming sale to R. T. and Bobbie E. Usher; nor (3) the prior Findings of Fact, Conclusions of Law and Order of Referee Authorizing and Confirming Sale of Property to R. T. Usher; nor (4) the Order of Judge McCormick made upon the review of said last mentioned Order; nor (5) the Order of the Judge dismissing petition under Chapter X of the Bankruptcy Act of 1938.

The omitted documents specified above in clauses (1)(a), (1)(b), (2), (3), (4), (5) of this Paragraph 9, will be found in said document file at the following pages, respectively:

(1)(a)	D 394*
(1)(b)	D 431
(2)	D 433
(3)	D 215
(4)	D 329
(5)	D 331

Correction of Erroneous Statements in Petitioner's Statement of the Case, and Statement of Additional Facts.

Petitioner at page 11 in its petition omitted to make reference to any ground for dismissing the purported appeal, other than that petitioner's charter had been declared void by the State of Delaware for failure to pay the Delaware franchise taxes.

Actually, the motion to dismiss was based on six different grounds. [R. 598-602.]

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*The Clerk of the District Court of the United States, Southern District of California, Central Division (hereinafter usually called the District Court), has compiled a file of all documents specified by appellant and appellee for use on the purported appeal to the United States Court of Appeals (hereinafter usually called the Court of Appeals), and has numbered the pages in said file. He has also compiled an index to the documents included in said file, and opposite each document described has specified the page in said document file where the document can be located. The Clerk of the Circuit Court has advised us that said document file and index thereto are now on file in the Supreme Court of the United States (hereinafter usually called the Supreme Court). That document file will hereinafter be referred to as "D", followed by the number of the page where the document appears.

The objects of the motion, as more fully stated therein, were (a) to save the bankrupt estate the cost of printing the record on the purported appeal; (b) to save the bankrupt estate attorney's fees and costs of printing briefs incident to a hearing of the purported appeal on the merits, and (c) to enable the trustee without further hindrance and delay by the bankrupt to comply with the order of liquidation. [R. 601-602.]

The grounds for dismissal, greatly condensed, were:

1. The bankrupt is not an aggrieved party; that the assets will be insufficient to pay the allowed claims, interest thereon, and the remaining costs, fees and expenses of administration; and that the bankrupt has no financial interest in the subject matter of the purported appeal;

2. That the bankrupt has no standing to appeal;

3. That bankrupt since April 1, 1937, has been a defunct corporation without legal capacity to prosecute the purported appeal;

4. That the purported authority from the corporation to the attorney who filed the purported appeal was insufficient to legally authorize him to file such notice, and the former directors and officers of the corporation were without power to confer such authority;

5. That to permit said purported appeal to stand would be contrary to the spirit and purpose of the Bankruptcy Act; and,

6. The purported appeal is invalid, confers no jurisdiction on the court, and has been taken for the sole purpose of hindering and delaying the Trustee in the performance of his statutory duties. [R. 598-601.]

The Court of Appeals granted the motion to dismiss without any specification of the ground or grounds upon which it acted. [R. 707.] It must be assumed, therefore, that it was granted on all grounds enumerated in the motion.

The petition in bankruptcy was filed against the bankrupt on March 19, 1935 [R. 604], and it was adjudicated a bankrupt on the 12th day of January, 1937, with the consent of the bankrupt [R. 604; Petition for Writ of Certiorari, last line, p. 14], and it became a defunct corporation on April 1, 1937, and has never since been revived. [Ex. E, R. 639.]

There is no Delaware statute which provides that a defunct corporation would be revived if the Trustee were to pay Delaware's claim No. 32 for $471.25 [R. 633-635], or the Delaware franchise taxes with or without penalties, for which bankrupt's charter was forfeited on April 1, 1937.

There is nothing in the record (or elsewhere) to show any demand was ever made upon the Trustee to pay Delaware's said claim (a) before the purported appeal was taken to the Court of Appeals, or (b) before said court dismissed said purported appeal.

There is nothing in the record (or elsewhere) to show that the Trustee ever had or now has any funds in his possession which he could have heretofore lawfully applied or which he could now lawfully apply toward the payment of Delaware's said claim, nor that the claims having priority over Delaware's claim have been paid. (See Sec. 64 of Bankrupty Act of 1938, U. S. C., Title 11, Ch. 7, Sec. 104.)

The corporation acting through two of its former officers is the only one which under the Delaware statutes is authorized to take the proceedings necessary to revive a defunct Delaware corporation.

A Delaware corporation whose charter has been forfeited is deemed to have a continuing existence for only limited purposes, none of which are present in this case.

The Trustee has no duty or power to revive a bankrupt corporation whose charter has been forfeited. (U. S. C., Title 11, Ch. 5, Sec. 75.)

The fact that the trustee paid California franchise taxes after the time the bankrupt forfeited its charter, could not operate to revive a Delaware corporation whose charter had been forfeited. (See Rule 17, par. (b) of Fed. Rules of Civ. Proc.; *Fidelity Metals Corp. v. Risley,* 72 Cal. App. 2d 377, 381.)

No California franchise taxes were paid after the Trustee filed his petition for an order of liquidation. This petition was filed April 14, 1952. [R. 604, D 86.] On May 26, 1952, the Referee ordered the Trustee to proceed with all due diligence with the sale of the assets, subject to confirmation by the court "to the end that the assets of said estate may be speedily converted into money, the expenses of administration paid and the residue paid to the creditors as required by law." [R. 605-606.]

The bankrupt and certain creditors filed a petition to review that order [D 106]. Upon the hearing thereof, after argument, and after calling attention to the fact that this was a *"protracted"* bankruptcy proceeding Judge

McCormick in his order of November 28, 1952, stated that he had believed

> "that if decision on the Referee's order of liquidation were deferred for a reasonable period, some other lawfully authorized equitable method of settlement would be forthcoming and duly proposed. Such other proceeding now seems to be unavailable. *Accordingly,* the Referee's order of liquidation dated May 26, 1952, is confirmed." [D 116.]

This review was regularly heard and argued on July 24, 1952, and the foregoing ruling thereon was not made until November 28, 1952. [R. 606-607.]

No appeal was taken from the court's order of confirmation, and said order is final. [R. 606.]

On November 19, 1953, bankrupt and its former president Fred P. Newport, filed with the Referee a petition entitled "PETITION FOR AN ORDER APPOINTING A DISBURSEMENT AGENT; DIRECTING SAID AGENT TO RECEIVE FROM ESCROW HOLDER AND TRUSTEE SUMS TOTALING $438,000.00 AND TO DISBURSE SAME TO PERSONS FOUND BY THE COURT TO BE ENTITLED TO SAME; STAYING ALL OTHER PROCEEDINGS AND DISMISSING THE BANKRUPTCY PROCEEDINGS HEREIN." [R. 607.] Said petition set forth an alleged offer of Earl P. Snyder (who was one of the bidders on the sale to Colter and wife). [R. 607, 118, D 291.]

On December 18, 1953, the Trustee filed with the Referee a motion to dismiss said petitiion on the grounds:

"1. That the Court has no jurisdiction over the subject matter of said petition.

"2. That said petition is a sham and is groundless, fictitious, vexatious and constitutes an imposition on the

> Court and an unjust burden on the Trustee and said Bankrupt Estate; and that a dismissal of said petition would be in the furtherance of justice." [R. 607-608; D 298.]

On a hearing regularly had before the Referee on December 30, 1953, the Referee made an order granting the Trustee's motion on all grounds above stated. [R. 608; D 301.]

Said petitioners filed a petition to review said last mentioned order. [R. 608; D 303.] The order of the Referee was affirmed, and the petition for review was dismissed on January 19, 1954. [D 312.]

On March 15, 1954, following the receipt of an amended bid by Mr. and Mrs. Colter, the Trustee filed an Amended and Supplemental Petition for Authority to Sell and for Confirmation of Sale of Real and Personal Property to R. T. and Robbie E. Colter. [D 366.] Objections thereto were filed by the bankrupt and certain creditors. [D 380.] After due notice [D 378], a hearing of said amended and supplemental petition and said objections thereto was had on April 6, 1954, at which time, after spirited bidding at public auction, the property was sold to Mr. and Mrs. Colter. Thereafter on May 3, 1954, the Referee made an order vacating the Referee's prior order of December 9, 1953 (confirming the original bid of R. T. Colter) confirming the sale to Mr. and Mrs. Colter for the sum of $407,000.00, taxing costs against the objecting creditors, and directing the Trustee, upon receipt of said sum, to convey the property to the Colters. [D 433.]

The bankrupt and certain creditors petitioned for a review of this order. [D 416.] This review was regularly had before Chief Judge Yankwich of the District Court.

Judge Yankwich, in his opinion [R. 617-627] affirming the order of the Referee confirming the sale of the assets to R. T. and Robbie E. Colter [D 433], calls attention to the facts (1) that the bankruptcy estate had been pending for over nineteen years; (2) that Judge McCormick of the District Court had previously referred to the matter as a "'protracted' administration"; (3) that at all times it had been the contention of the bankrupt that matters could have been worked out differently; (4) that the Referee had correctly stated: "A bankrupt case is a lot different than where the property is in private hands. If the man has property in his own hands not subject to legal process or creditors' claims, he can wait indefinitely. But a bankrupt estate can't. It is the creditors' funds and they are entitled to get paid sometime. The only question here is haven't we come to the end of the trail? How much longer are we going to put the creditors off, how much longer are they going to be put off before they get their money? If I had any evidence before me to show that you could within a reasonably short time—any definite evidence—get a better buyer, that would be an entirely different situation"; (5) that the two most recent acts in the bankruptcy proceeding, which occurred before the present Order of Sale, were opposed upon the same nebulous ground that, as the condition of the estate is improving, additional time might bring better results; (6) that Judge McCormick had appended to his order of October 22, 1951, a note to the effect that he had delayed his decision for almost four months to accord to all interested parties an opportunity "to submit for consideration a plan or method that is more beneficial and equitable to the estate than the compromise under review. None such has been presented or offered"; (7) that on review of the

Referee's order of sale of December 9, 1953, the District Court had referred the matter back to the Referee "for the purposes of conducting a hearing and if possible obtaining a definite and positive and certain bid for the property; and if the present bidder desires to withdraw his deposit within ten days, he may do so, and if he does not, his bid may be considered when further proceedings are had before the referee"; (8) that an amended and supplemental petition for authority to sell had been filed on March 15, 1954, and new notices were given; (9) that petitioners (consisting of bankrupt and certain creditors) [D 380] filed objections thereto; and (10) that at the conclusion of the hearing of said amended and supplemental petition and said objections thereto the Referee, after bidding in open court, had confirmed the sale to the Colters, and had set forth in a 37-page opinion his reasons for so doing. (See Judge Yankwich's opinion in 123 Fed. Supp. 95.)

General Order in Bankruptcy 18 requires sales to be made at public auction. U. S. C., Title 11, Chapter 6, Sec. 94(a)(4), requires notice of sales to be given to creditors by mail. There is no requirement for advertising in any newspaper. However, on the sale here involved to Mr. and Mrs. Colter, there was one advertisement by newspaper. In addition thereto, the Trustee persistently endeavored to find a purchaser. [R. 24-45, 50.] There was spirited bidding at the sale on behalf of Mr. and Mrs. Colter by their agent, Mr. Zeller, on behalf of Mr. William Berk by attorney Jerome Weber, and by Mr. Earl P. Snyder in person. [R. 54-119; 118-119.]

Before the filing by the Trustee of said amended and supplemental petition, to wit, on March 9, 1954, R. T. Colter and his wife, Robbie E. Colter, filed an amended

bid wherein it was stated to be the "intention to make it conform to the order of the Hon. Paul J. McCormick United States District Judge, entered February 9, 1954." Then follows in detail the amended bid. [D 366.]

In said objection to said last mentioned petition, the objectors prayed as follows:

> "WHEREFORE, your objectors pray that the trustee be granted no relief as prayed for by him in paragraphs '3', '4' and '6' of his said amended and supplemental petition; that the offer described in said petition be rejected; that the assets described therein be not sold enmasse, or in any manner, or at all; and that under the direction and guidance of the Court that the 100% rehabilitation of the bankrupt corporation be accomplished through one of the reorganization plans hereinbefore described that will be found by the Court and the parties interested the best for the accomplishment of the purposes hereinbefore outlined and the dismissal of the bankruptcy proceedings herein." [R. 611-612; D 380.]

Mr. Fred P. Newport, who was the president of the bankrupt at the time its charter was forfeited, has signed the name of the bankrupt, by him as president, to the Opposition to Motion to Dismiss the Purported Appeal to the Court of Appeals.

Throughout those objections, as well as throughout the bankruptcy, Mr. Newport appears to have considered himself as the guiding hand of the bankrupt corporation, and the administrator of its assets. [R. 656-675.] Prior to the attempted appeal herein, he always joined with him certain creditors of the corporation who possessed the

right to question the acts of the Trustee and the orders by the Referee and District Court Judges. However, on the bankrupt's attempted appeal its prior companions abandoned it, and for the first time the bankrupt was left to stand alone. Since on previous reviews and appeals it was necessary to determine the matter on the merits, the right of the bankrupt to participate therein was not questioned. The attorney who signed the purported notice of appeal [R. 593], had never before appeared for the bankrupt. [R. 614.] The purported resolution of the bankrupt [R. 594], recites the holding of a special meeting of the bankrupt corporation on August 10, 1954, and the passage of a resolution authorizing Milton B. Safier, who signed the purported notice of appeal, to take said purported appeal. Between pages 676 and 677 of the Record appears a purported waiver of notice signed by all of the purported directors of the defunct bankrupt corporation, purporting to consent to the holding of a "Special Meeting of the Board of Directors of said corporation" for the purpose of adopting said purported resolution and another resolution thereto attached.

If such a meeting was held, it clearly constituted a corporate act, and if valid, would operate to create a new obligation against the defunct corporation for attorney's fees and costs and expenses incurred in carrying out the employment.

We think this was criminal offense under Title 8, Chapter 5, Section 513 of the New Delaware Code which became effective February 12, 1953, elsewhere herein quoted in full.

The Delaware Statutes Do Not Confer on a Bankrupt Corporation Whose Charter Has Become Void, the Right to Appeal From an Order Authorizing and Confirming the Sale of the Remaining Unliquidated Assets of the Bankrupt Corporation Made Pursuant to a Final Order of Liquidation.

The sections of the Delaware Corporation Franchise Tax Law, so far as applicable, are Sections 510, 511, 512 and 513 of Title 8, Chapter 5, of the New Delaware Code, which became effective February 12, 1953. Our examination of these sections, to the extent quoted below, indicates that they stand at the present time as they stood (but numbered differently) in the Revised Code of Delaware of 1935.

> "Section 510. Failure to pay tax for two years; charter void; extension of time.
>
> "If any corporation, accepting the provisions of the Constitution of this State and coming under the provisions of chapter 1 of this title, or any corporation which has heretofore filed or may hereafter file a certificate of incorporation under the provisions of said chapter, neglects or refuses for two consecutive years to pay the State any franchise tax or taxes, which has or have been, or shall be assessed against it, or which it is required to pay under the provisions of this chapter, the charter of the corporation shall be void, and all powers conferred by law upon the corporation are declared inoperative, unless the State Tax Board, for good cause shown to it, gives further time for the payment of the tax or taxes, in which case a certificate thereof shall be filed by the Board in the office of the State Tax Department stating the reason therefor." (Revised Code of Delaware of 1935, Ch. 6, Sec. 105, Franchise Tax Law, Sec. 71.)

"Sec. 511. Repeal of charters of delinquent corporations; report to Governor and proclamation.

"On or before the first Tuesday of January in each year, the State Tax Department shall report to the Governor a list of all the corporations, which for two years next preceding such report, have failed, neglected or refused to pay the franchise taxes assessed against them or due by them, under the laws of this State, and the Governor shall forthwith issue his proclamation declaring that the charters of these corporations are repealed." (Revised Code of Delaware of 1935, Ch. 6, Sec. 106, Franchise Tax Law, Sec. 72.)

"Sec. 512. Filing and publication of proclamation; noting repeal in recorder's office.

"The proclamtion of the Governor shall be filed in the office of the Secretary of State and advertised in at least one, and not more than three, newspapers published within this State. Upon the filing of the proclamation, the Secretary of State shall transmit forthwith to the recorder of each county of this State a certified copy of the proclamation, and each recorder shall, upon receipt of such certified copy, forthwith mark in brief upon the margin of the record of the certificate of incorporation of the corporation named in the proclamation, which is of record in his office, the fact that the charter of the corporation is repealed, and the date of the repeal." (Revised Code of Delaware of 1935, Ch. 6, Sec. 107, Franchise Tax Law, Sec. 73.)

"Sec. 513. Acting under proclaimed charter; penalty.

"Whoever exercises or attempts to exercise any powers under the certificate of incorporation of any corporation which has been proclaimed by the Governor, after the issuance of the proclamation, shall be fined

not more than $1,000 or imprisoned not more than one year, or both." (Revised Code of Delaware of 1935, Ch. 6, Sec. 108, Franchise Tax Law, Sec. 74.)

The sections of the Delaware General Corporation Law, so far as applicable, are Sections 278, 279, 280, 281 and 282 of Subchapter X, and Sections 312 and 314 of Subchapter XII, of Title 8, Chapter 1, of the New Delaware Code which became effective February 12, 1953. Our examination of these sections, to the extent quoted below, indicates that they stand at the present time substantially as they stood (but numbered differently), in the Revised Code of Delaware of 1935.

"Sec. 278. Continuation of corporation after dissolution for purposes of suit and winding up affairs.

"All corporations, whether they expire by their own limitation or otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully

executed." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2074, General Corporation Law, Sec. 42, Laws of Delaware of 1941, Vol. 43, Ch. 132.)

"Sec. 279. Trustees or receivers for dissolved corporations; appointment; powers.

"When any corporation organized under this chapter shall be dissolved in any manner whatever the Court of Chancery on application of any creditor or stockholder of the corporation, at any time, may either appoint one or more of the directors thereof trustees, or appoint one or more person to be receivers, of and for the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2075, General Corporation Law, Sec. 43. Laws of Delaware of 1951, Vol. 48, Ch. 353.)

"Sec. 280. Jurisdiction of court.

"The Court of Chancery shall have jurisdiction of the application prescribed in section 279 of this title and of all questions arising in the proceedings thereon, and may make such orders and decrees and issue injunctions therein as justice and equity shall require." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2076, General Corporation Law, Sec. 44.)

"Sec. 281. Duties of trustees or receivers; payment and distribution to creditors and stockholders.

"The trustees or receivers of a dissolved corporation, after payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, shall pay the other debts due from the corporation, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose. If there shall be any balance remaining after the payment of the debts and necessary expenses, they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation, or their legal representatives." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2077, General Corporation Law, Sec. 45.)

"Sec. 282. Abatement of pending actions; substitution of dissolution trustees or receivers.

"If any corporation organized under this chapter becomes dissolved by the expiration of its charter or otherwise, before final judgment obtained in any action pending or commenced in any court of record of this State against the corporation, the action shall not abate by reason thereof, but the dissolution of the corporation being suggested upon the record, and the names of the trustees or receivers of the corporation being entered upon the record, and notice thereof served upon the trustees or receivers, or if such service be impracticable upon the counsel of record in such case, the action shall proceed to final judgment against the trustees or receivers by the

name of the corporation." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2078, General Corporation Law, Sec. 46.)

"Sec. 312. Renewal, revival, extension and restoration of charter.

"(a) Any corporation existing under the laws of this State, may, at any time before the expiration of the time limited for its existence and any corporation existing under the laws of this State whose charter has become inoperative by law for non-payment of taxes and any corportion existing under the laws of this State whose charter has expired by reason of failure to renew the same or whose charter has been renewed, but, through failure to comply strictly with the provisions of this chapter, the validity of whose renewal has been brought into question, may at any time procure an extension, restoration, renewal or revival of its charter, together with all the rights, franchises, privileges and immunities and subject to all of its duties, debts and liabilities which had been secured or imposed by its original character and all amendments thereto.

"(b) The extension, restoration, renewal or revival of the charter may be procured by filing with the Secretary of State a certificate of any two of its last acting officers or other officers to be elected as provided in subsection (h) of this section, duly sworn or affirmed to by such officers before any person authorized by the laws of this State to administer oaths or affirmations. The certificates shall not be executed by any officer and his assistant officer, as for instance a secretary and an assistant secretary, and the two officers executing the certificate shall not be one and the same person.

"(c) The certificate prescribed in subsection (b) of this section shall state—

(1) The name of the corporation, which name shall be the existing name of the corporation or the name it bore when its charter expired, except as otherwise provided in subsection (f) of this section;

(2) The name of the city, town or place within the county in which its principal office or place of business is located in this State and the name of its resident agent and, in towns or cities of over 6000 inhabitants, the street and number of its principal office or place of business and its resident agent;

(3) Whether or not the renewal, restoration or revival is to be perpetual and if not perpetual the time for which the renewal, restoration or revival is to continue and, in case of renewal before the expiration of the time limited for its existence, the date when the renewal is to commence, which shall be prior to the date of the expiration of the old charter which it is desired to renew;

(4) That the corporation desiring to be renewed or revived and so renewing or reviving its charter was duly organized under the laws of this State;

(5) The date when the charter of the corporation would expire, if such is the case, or such other facts as may show that the charter has become inoperative or void or that the validity of any renewal has been brought into question;

(6) That the certificate for renewal or revival is filed by authority of those who were directors or managers of the corporation at the

time its charter expired or who were elected directors or managers of the corporation as provided in subsection (h) of this section.

"(d) The certificate shall be filed in the office of the Secretary of State, who shall furnish a certified copy of the same under his hand and seal of office. The certified copy shall be recorded in the office of the recorder of the county in which the principal office of the corporation is located in this State, in a book kept for the purpose. The certificate or a certified copy thereof duly certified under the hand of the Secretary of State and his seal of office accompanied with the certificate of the recorder of the county wherein the same is recorded under his hand and seal of office, stating that it has been recorded, the record of the same in the office of the recorder, or a copy of the record duly certified by the recorder, or the record of the certified copy recorded in the recorder's office, shall be evidence in all courts of this State.

"(e) Upon the recording of the certificate the corporation shall be renewed and revived with the same force and effect as if its charter had not become inoperative and void or had not expired by limitation. Such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the corporation, its officers and agents during the time when its charter was inoperative or void or after its expiration by limitation, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect. All real and personal property, rights and credits, which belonged to the corporation at the time its charter became inoperative or void, or expired by limitation and which were not disposed of prior to the time of its revival or renewal shall be vested in the corporation, after its re-

revival and renewal, as fully and amply as they were held by the corporation at and before the time its charter became inoperative or void or expired by limitation, and the corporation after its renewal and revival shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its officers and agents prior to its reinstatement, as if its charter had at all times remained in full force and effort.

"(f) If, since the charter became inoperative or void for nonpayment of taxes or expired by limitations, any other corporation organized under the laws of this State shall have adopted the same name as the corporation sought to be renewed or revived or shall have adopted a name so nearly similar thereto as not to distinguish it from the corporation renewed or revived under the provisions of this section, then, in such case the renewed or revived corporation shall not be renewed under the same name which it bore when its charter became inoperative or void or expired but shall adopt and be renewed under some other name which, under existing law, could be adopted by a corporation formed and organized under the provisions of this chapter and in such case the certificate to be filed under the provisions of this section shall set forth the name borne by the corporation at the time its charter became inoperative or void or expired and the new name under which the corporation is to be renewed or revived.

"(g) Any corporation seeking to renew or revive its charter under the provisions of this chapter shall pay to this State, in lieu of and in full satisfaction of all franchise taxes and penalties thereon due this State, a sum equal to all franchise taxes and penalties thereon due at the time its charter became inoperative and void for nonpayment of taxes, or expired by limi-

tation or otherwise and shall present to the Secretary of State, together with its certificate of renewal or revival, proof of the payment to the Tax Department of this State.

"(h) If only one or none of the last acting officers of any corporation desiring to renew or revive its charter is available by reason of death, unknown address or refusal or neglect to act at the time of its renewal, the directors of the corporation, or those remaining on the board if not less than three, may elect a successor to the officer or officers who are dead or whose addresses are unknown or who refuse or neglect to act. In any case where there shall be less than three directors of the corporation available for the purposes aforesaid, by reason of death, unknown address or refusal or neglect to act, the stockholders of the corporation may elect as many directors as may be necessary, together with the directors who are ready and willing to act, to constitute a board of three directors or they may elect a full board of directors, as provided by the by-laws of the corporation, and the board may elect successors to the officers who are deceased or whose addresses are unknown or who refuse or neglect to act. A meeting of the directors of the corporation for the election of officers may be called by any officer or any director upon ten days' written notice delivered personally or mailed to the last known post office address of each director. A meeting of the stockholders for the purpose of electing directors may be called by any officer, director or stockholder upon ten days' written notice delivered or mailed to the last known post office address of each stockholder. Any two of the officers may then take all steps and do all things necessary and proper to be done for the renewal or revival of the existence of the corporation as provided in this section.

"(i) After a renewal or revival of the charter of the corporation shall have been effected, the two officers who signed the certificate of renewal or revival shall, jointly, forthwith call a meeting of the stockholders of the corporation upon not less than ten days' written notice, and at the meeting the stockholders shall elect a full board of directors, which board shall then elect such officers as are provided by law, by the charter or the by-laws to conduct and carry on the business and affairs of the corporation. * * *." (Revised Code of Delaware of 1935, Ch. 65, Secs. 2106 and 2107, General Corporation Law, Secs. 74 and 75, Laws of Delaware of 1945, Vol. 45, Ch. 158.)

"Sec. 314. Status of corporation.

"Any corporation desiring to renew, extend and continue its corporate existence, shall upon complying with the provisions of sections 312 or 313 of this title, and with the provisions of section 2 of Article IX of the Constitution of this State, be and continue for the time stated in its certificate of renewal, a corporation and shall, in addition to the rights, privileges and immunities conferred by its original charter, possess and enjoy all the benefits of this chapter, which are applicable to the nature of its business, and shall be subject to the restrictions and liabilities by this chapter imposed on such corporations." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2109, General Corporation Law, Sec. 77.)

We have shown by Exhibit E attached following R. 638 that the bankrupt became inoperative and void on April 1, 1937, for nonpayment of taxes, that it was proclaimed by the Governor on January 24, 1938, and that no reinstatement proceeding had been instituted on August

19, 1954, a date subsequent to the purported appeal to the Court of Appeals. Petitioner inferentially freely admits that no such proceeding has been had or initiated.

Said Section 510, *supra,* provides that if a Delaware corporation "neglects or refuses for two consecutive years to pay the State any franchise tax or taxes, * * * the charter of the corporation shall be void, and all powers conferred by law upon the corporation are declared inoperative, * * *."

Section 511, *supra,* provides for a declaration by the Governor declaring that the charter of all such corporations are repealed.

Section 512, *supra,* provides for the filing of such proclamation with the Secretary of State, and for the transmittal of a certified copy thereof to each county in the state and a recordation thereof by the recorder of each county.

Section 513, *supra,* provides that whoever exercises or attempts to exercise any powers under a certificate of incorporation, after the issuance of such proclamation by the Governor, shall be fined or imprisoned, or both.

Section 278, *supra,* when read in connection with the sections following it, shows quite clearly that the litigation therein referred to is litigation in the courts of Delaware. That section provides that dissolved corporations continue for three years after "dissolution, bodies corporate for the *purpose* of prosecuting and defending suits by or against them, and of enabling *them* gradually to settle and close *their business,* to dispose of and convey *their* property, and to divide *their* capital stock, *but not for the purpose of continuing the business for which the corporation was formed.*" This section makes further provisions to the effect that such dissolved corporations, as to

actions, suits or proceedings commenced against the corporation before or within three years after dissolution, shall, *only for the purpose of such actions, suits or proceedings,* be continued corporate bodies until any judgments, orders or decrees therein shall be fully executed. (Emphasis added.)

Section 279, *supra,* provides that as to any such dissolved corporation, the Court of Chancery, on application of any *creditor or stockholder* of the corporation "may either appoint one or more of the directors thereof trustees, or appoint one or more persons to be receivers, of and for the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation" with power to defend and prosecute suits "in the name of the corporation, or otherwise. * * * that may be necessary for the final settlement of the unfinished business of the corporation."

Section 280, *supra,* provides that the Court of Chancery shall have jurisdiction of the application under said Section 279.

Section 281, *supra,* prescribes the duties of trustees and receivers of dissolved corporations, and the use by them of the funds of the corporation, after the payment of prior charges, with which to "pay the other debts due from the corporation, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts *in the manner that shall be directed by an order or decree of the court for that purpose.* If there shall be any balance remaining * * *, they shall distribute and pay the same to * * * (the) stockholders of the corporation * * *" (not to the corporation). (Emphasis added.)

The capital of a corporation upon dissolution becomes a fund for the payment of creditors and stockholders. At common law, a corporation not holding meetings of stockholders became not legally dead but dormant, capable of being revived but incapable of corporate action without such revival. (*Higgins to Use of Wil. & Reading R. R. Co. v. Downward & Sons,* 8 Houst. 227, 14 Atl. 720, 32 Atl. 133 (1888).)

Where the charter of a corporation was declared void for non-payment of franchise taxes, the corporation may be continued under Section 42 (now Sec. 278 of said Title 8) in order to wind up its affairs. (*Big Sespe Oil Co. v. Cochran,* 276 Fed. 216 (C. C. A. 9th, 1921).)

Section 42 (now Sec. 278 of said Title 8), which continues a corporation's existence for three years after repeal of its charter for the limited purpose of prosecuting and defending suits and winding up its business, applies to a corporation whose charter has become inoperative and void for non-payment of its franchise tax. (*United Automatic Rifle Corp. v. Johnson,* 41 Fed. Supp. 86 (D. C., Mass., 1941).)

Section 282, *supra,* provides that if any action pending in the *state* court has not been reduced to final judgment, the action is to be continued in "the names of the trustees or receivers of the corporation * * *."

In short, Sections 278-282, *supra,* all fall under Title 8, Chapter 5, Subchapter X of the Delaware Corporation Franchise Tax Law, effective February 12, 1953, which Subchapter X is entitled "Sale of Assets; Dissolution and Winding Up," and all relate to such actions and proceedings in the State Courts of Delaware.

Before those sections could apply, the dissolved bankrupt corporation would have to be possessed of an estate to be administered and wound up. In the case at bar the bankrupt was adjudicated on January 12, 1937, by consent of the bankrupt, on an involuntary petition filed on March 19, 1935. On January 12, 1937, the title to all of the bankrupt's assets vested in the Trustee, effective as of March 19, 1935, and ever since adjudication such assets have been administered thereunder by the Trustee.

Up until 1952, when the order for liquidation was made, the estate of the bankrupt was being administered as a going business, within the meaning of Section 52 of the Revenue Act of 1938. (See *United States v. Metcalf*, 131 F. 2d 677.)

Had such operation been carried on by the Trustee under said Section 278, *supra* (which provides for continuing corporate capacity to perform certain specific acts for certain designated purposes, "but not for the purpose of continuing the business for which the corporation shall have been established"), such operation would have been in excess of the powers granted under said Section 278 and would have been illegal under Section 513, *supra*.

The proceeding to have the defunct corporation declared bankrupt, terminated and became final on January 12, 1937, when the corporation was adjudicated bankrupt with the consent of the bankrupt. Its charter became inoperative and void on April 1, 1937. The petition for liquidation was not filed until April 14, 1952. The order of liquidation was made on May 26, 1952, was taken up on review and affirmed on November 28, 1952. No appeal therefrom was taken and it long since has become and remains final.

The petition for liquidation was neither "an action, suit, or proceeding begun or commenced *by* or *against the corporation* prior to * * * dissolution * * * (nor was it) begun or commenced *by or against the corporation* within three years after the date of the * * * dissolution * * *," and consequently did not operate to keep the corporation alive for the purpose of that petition, within the meaning of the last sentence of said Section 278, *supra.*

Neither was the petition for approval and confirmation of sale of the bankrupt's unliquidated assets, nor the amended and supplemental petition for sale and confirmation of sale of those assets, an action, suit or proceeding *against the corporation.*

In the case of *Harned v. Beacon Hill Real Estate Co.,* 9 Del. Ch. 411, 84 Atl. 229 (1912), the Supreme Court of Delaware, at pp. 422-423, explained the purpose of Section 278, *supra,* as follows:

> "* * * While a dissolved corporation is not continued for the purpose of doing the business for which it was created, it continues in order that, for the period of three years, the corporation itself may settle and close its business, and, if it fails so to do, that thereafter its creditors and stockholders may, by application to the Court of Chancery, secure the appointment of trustees or receivers who shall make final settlement of the unfinished business of the corporation. And any property which may not have been disposed of by the company *before dissolution, or during the succeeding three years,* is not lost, but remains the property of the corporation, so that it may be sold and disposed of *for the benefit of creditors and stockholders.*" (Emphasis added.)

The Trustee was simply pursuing his duties under the Bankruptcy Act and said order for liquidation and distribution of the assets of the bankrupt estate then owned and possessed by the Trustee when he proceeded with the liquidating sale.

The proceeding was in its nature a proceeding *in rem* and not *in personam,* and did not even require notice to the bankrupt, as distinguished from the creditors. (U. S. C., Title 11, Ch. 6, Sec. 94a; 6 Am. Jur. 569, Sec. 26; *Local Loan Co. v. Hunt,* 229 U. S. 294, 78 L. Ed. 1230, 93 A. L. R. 195.)

It occurs to us that the question of whether state statutes and state decisions can be given any effect in matters involving the assets of a bankrupt estate in the administration thereof, was put at rest in *Gross v. Irving Trust Co.,* 289 U. S. 342-345, 77 L. Ed. 1243, at 1244-1245. In that case a receiver had been appointed for a corporation which later became bankrupt. The receiver took over the assets and proceeded with the performance of its duties. After adjudication in bankruptcy, the trustee sold all of the bankrupt's assets, including those involved in the receivership, and the receiver, according to the state law and decisions, applied to the state court for an order fixing their fees, which order was granted. Thereafter the federal district court ordered the receiver and attorneys to account to it for their fees. The trustee claimed that the state court order was void and in violation of the Bankruptcy Act. This claim was upheld by the District Court and affirmed by the Circuit Court. Certiorari was granted by the United States Supreme Court. At pages 1244-1245 the Supreme Court said:

> "The sole question presented for our determination is: Did the state chancery court have the power to fix

the compensation of its receivers and their counsel after bankruptcy had supervened within four months of the filing of the bill of complaint in, and the appointment of receivers by, that court?

"The state courts of New Jersey have steadily held in the affirmative, and that view is not without support. We deem it unnecessary, however, to review these decisions. They are not in harmony with the views expressed by this court or with other decisions, which in our opinion, state the true rule.

"Upon adjudication of bankruptcy, title to all the property of the bankrupt, wherever situated, vests in the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction, and that court's possesssion and control of the estate cannot be affected by proceedings in other courts, state or federal. Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 737, 75 L. Ed. 645, 660, 51 S. Ct. 270, and cases cited. Such jurisdiction having attached, control of the administration of the estate cannot be surrendered even by the court itself. *Id.*, 739. 'The filing of the petition is a caveat to all the world and in fact an attachment and an injunction.' May v. Henderson, 268 U. S. 111, 117, 69 L. Ed., 870, 874, 45 S. Ct. 456, and citations. And see generally Moore v. Scott (C. C. A. 9th) 55 F. 2d 863; *Re* Diamond (C. C. A. 6th) 259 Fed. 70, 44 Am. Bankr. Rep. 268."

Thus it appears that the very things which, under Section 278, the dissolved corporation, its receiver or trustee are allowed to do and perform after dissolution are the same things which the trustee in bankruptcy is required to do and perform.

The bankrupt possesses no greater rights in California than it possesses in Delaware where it was incorporated.

In *Fidelity Metals Corp. v. Risley,* 77 Cal. App. 2d 377, at 381, the court concisely stated this principle in the following language:

> "It appears to be settled law that the effect of the dissolution of a corporation, or its expiration otherwise, depends upon the law of its domicile. (Restatement, Conflict of Laws, pp. 228-229, §158; 20 C. J. S., pp. 128-129, §§1899, 1900), and that a defunct foreign corporation has no greater capacity or higher standing to commence or maintain an action in the state of the forum than it would have in the state of its domicile." (See also Rule 17(b) F. R. C. P.)

A Dissolved and Defunct Corporation Is Without Right or Power to Do Any Act Necessary to Effect a Valid Appeal From an Order Authorizing and Confirming a Liquidating Sale of Remaining Assets, Exclusive of Cash, Under a Final Order of Liquidation; and the Same Rule Should Apply to Every Bankrupt, Natural or Corporate.

This corporation became bankrupt as of March 19, 1935 (the date of filing of the petition upon which the corporation, with its consent, was adjudicated a bankrupt on January 12, 1937, and before its dissolution), and on that date the title to all of its assets passed by operation of law to the trustee in bankruptcy. (*In re Sawilowsky,* 284 Fed. 975 (U. S. D. C. Fla); Sec. 70a of the Bankruptcy Act, U. S. C., Title 11, Ch. 7, Sec. 110.)

In the *Sawilowsky* case, just cited, the court at pages 975-976 said:

> "In the instant case if the trade name did pass to the trustee, there was no abandonment, and the cases bearing upon that question are not in point. In the instant case the trade name and good will were ap-

propriated and sold for the benefit of the creditors. As I have had occasion heretofore to point out (284 Fed. 158), the bankrupt, having parted with his property for the benefit of his creditors, can have no interest in the method of the disposal of same, and is not a person interested, who can have a review of the order of the referee confirming a sale of same."

The Circuit Court of Appeals, Fifth Circuit, in 288 Fed. 533, refused to disturb the decision of the District Court last above quoted from.

In re Settem, 118 Fed. Supp. 897 at 898 (1954), the *Sawilowsky* case was cited in support of the following text:

"Petitioner's right to review is somewhat doubtful, for he has parted with his property rights for the benefit of his creditors, and retains no interest therein. The property in the bankrupt estate has passed to petitioner's trustee."

The findings, conclusions and order of the referee were adopted and affirmed.

In *Ruckel v. Metropolitan Life Ins. Co.,* 240 Pac. 409, at 410, the Supreme Court of Kansas said:

"Once the federal trustee in bankruptcy has taken charge of an insolvent corporation's assets, business and affairs, pursuant to federal law, the corporation's officers and board of directors have no further official concern with it, unless and until it is financially rehabilitated and *surrendered* to their custody by order of the bankruptcy court." (Emphasis added.)

In *Berl v. Crutcher,* 60 F. 2d 440, a Delaware corporation acquired certain oil leases in East Texas. Subsequently it was adjudged bankrupt. Two years later it became defunct for failure to pay its Delaware franchise taxes.

The trustee abandoned the leases as worthless. The retained estate was administered and closed and the trustee was discharged. After several years oil was discovered on the land. The former stockholders and officers of the corporation, believing that the abandoned assets had fallen back to the corporation, revived or caused the corporation's charter to be revived by a Mr. Turner, a former stockholder and official of the corporation, by paying the delinquent taxes. Thereupon, the creditors in the original bankruptcy proceeding moved in, the bankruptcy was reopened, a new receiver or trustee was appointed, and took possession of the abandoned assets. There were subsequent proceedings in the bankruptcy court and the case went up to the Circuit Court. One of the questions on appeal was whether there was any validity in the acts of the officers of the dissolved corporation, which had been defunct for many years, in taking steps to revive it, and other corporate action which had a bearing on the procedure.

The Circuit Court at page 444 of its decision made the following comment:

> "It is the general rule in the United States that, where the charter or by-laws of a corporation provide for the annual election of officers and directors, and no election is held, the former officers hold over until their successors are elected. But this applies to a going concern, where there is no break in the exercise of the duties of the officers and directors. In this case the by-laws provide for annual elections of officers and directors by the stockholders. Since the date of bankruptcy, January, 1923, there have been no meetings of stockholders and no elections. The corporation was insolvent, and with the adjudication in bankruptcy all of its property passed out of its con-

trol, and the officers and directors ceased to function. Its charter was repealed two years after bankruptcy. When that occurred, the corporation might be considered dissolved by operation of law. * * * We are not required to determine whether the act of Turner in having the charter revived again vested the corporation with legal existence, but it would be ridiculous to say that the former officers and directors have any authority at this time to represent the corporation or its stockholders in any disposition of its property. Any authority they may be given hereafter must come from the stockholders."

Thus again we have a judicial recognition that after the dissolution of a Delaware corporation its officers and directors are without power to act and that any such power must come from the stockholders.

This brings us to a consideration of whether the officers or directors of the dissolved bankrupt corporation possessed any power or authority to adopt the purported resolution of the dissolved bankrupt corporation attached to the purported notice of appeal filed herein. [R. 593, 594.]

We claim that the purported resolution was a nullity and that the purported appeal based thereon is also a nullity.

The purported resolution reads as follows:

"Resolution

"At a special meeting of the F. P. Newport Corporation, Ltd., held on August 10th, 1954, the following resolution was adopted:

"RESOLVED, that Milton B. Safier be and he is hereby employed and designated as counsellor and attorney-at-law to file notice of appeal from the judgments and orders of Judge Leon R. Yankwich,

and each of them, as affecting the F. P. Newport Corporation, Ltd., signed and dated July 13, 1954, to the United States Court of Appeals for the Ninth Circuit and he is directed and authorized to file any and all notices of appeal, cost bonds and other necessary papers in connection with the said appeal.

"He is further authorized to associate with him on the appeal any attorney or attorneys who he may thereafter select.

"Dated at Los Angeles, California, this 10th day of August, 1954.

F. P. Newport
President

(SEAL) F. P. Newport Corporation, Ltd.
J. B. Gribble
Secretary
F. P. Newport Corporation, Ltd."

It will be noted that this purports to be a resolution of the dissolved bankrupt corporation passed at a special meeting of that corporation (not of its stockholders) held on August 10, 1954. It purports to set forth a corporate act which the defunct corporation is incapable of performing. On its face it purports to be a corporate act employing an attorney to appeal to the Court of Appeals from the orders designated in the purported notice of appeal [R. 593] made by the District Court. It will be noted from the affidavit of Mr. Norman A. Bailie filed in support of the motion to dismiss appeal [R. 603, 614] that Mr. Milton B. Safier who signed the notice of appeal to the Court of Appeals had never before appeared as attorney for the bankrupt corporation in any of the bank-

ruptcy proceedings, and that Mr. L. M. Cahill had appeared as attorney for the bankrupt (and certain objecting creditors) in all prior proceedings involved in this bankruptcy.

If such employment were held to be a lawful act of the defunct corporation, the resolution contains an implied obligation to pay for the services performed by the attorney in the course of such employment, and thus the contracting of a new obligation not for any purpose of liquidating any assets of the bankrupt estate, but to prevent such liquidation and thus to delay the Trustee in the performance of his duties both under the order of liquidation and under the Bankruptcy Act. We think that neither the defunct corporation, its former officers or directors possess any such power.

We can see no escape from the conclusions (1) that the purported resolution is a nullity; (2) that the purported corporate act is not one which the dissolved bankrupt corporation is authorized to perform in view of the finality of the order of liquidation; and (3) that the purported resolution and the purported appeal based thereon were designed solely for the purpose of further delaying the Trustee in the performance of his duties under the Bankruptcy Act and in the execution of the final orders of the bankruptcy court designed to accomplish the expeditious liquidation of the assets and the winding up of the bankrupt estate.

We believe the authorities heretofore cited by us herein support the foregoing conclusions.

The Remaining Assets of the Bankrupt Estate Are Insufficient to Discharge the Approved Unsecured and Unpaid Claims, the Interest Due Thereon, and the Remaining Costs, Fees and Expenses of Administration.

The assets of the estate, as shown by the affidavit of Mr. Norman A. Bailie [R. 603] in support of the Trustee's motion to dismiss the purported appeal, consist of $407,000.00 payable under the order appealed from, plus $17,275.46 in the hands of the Trustee, aggregating the sum of $424,275.46.

The certificate of Referee Dickson [R. 633] filed in support of said motion, shows the approved, unsecured and unpaid claims against this estate amount, in the aggregate, to the sum of $187,906.84. Interest thereon from the 19th day of March, 1935, to and including the 19th day of October, 1954, computed at the legal rate of 7% per annum, aggregates $257,586.96, aggregating, principal and interest $445,493.80.

With respect to the allowance of this interest, we quote an excerpt from Judge Yankwich's memorandum opinion [R. 617] rendered by him on the review of the Referee's order confirming the sale of the assets:

> "The Referee was also right in allowing interest to the unsecured creditors. In all liquidations, whether under bankruptcy or other statutes, if there be a surplus in the estate, interest is allowed on unsecured claims. (See *In re* John Osborn's Sons & Co., Inc., 2 Cir., 1910, 177 Fed. 184; Johnson v. Norris, 1911, 5 Cir., 190 Fed. 459, 463-465; American Iron & Steel Mfg. Co. v. Seaboard Airline Ry., 1914, 233

U. S. 261; Federal Deposit Ins. Corp. v. Citizens State Bank of Niangua, 1942, 8 Cir., 130 F. 2d 102; Ticonic Bank v. Sprague, 1938, 303 U. S. 406, 410-411; Fujikawa v. Sunrise Soda Water Works, 1946, 9 Cir., 158 F. 2d 490, 494-495; Heightstown Rug Co. v. National Savings and Trust Co., 1947, U. S. App. D. C., 162 F. 2d 10.)

"The theory behind the cases is that regardless of any direct agreement, interest is due the creditor the moment his debt becomes due and is not paid. If the estate, whether in bankruptcy, receivership, or statutory liquidation, is insolvent, the interest, although it runs during the period when the assets are insufficient to pay the principal of the claims, will not be paid. But if there is a surplus, interest will be paid. And this rule applies whether the liquidation is brought about by the voluntary act of the debtor or by the act of creditors or statutory liquidating authorities. The objection to interest reveals once more the inconsistency in the attitude of the bankrupt in this case. On the one hand, after it has succeeded in keeping the estate in court for nearly twenty years, it still insists that the period should be extended further and the sale of all the remaining assets be denied approval by the Court. Yet it would deny to its unsecured creditors the right to receive interest during the long period of this administration. One does not have the right to do business at the expense of one's creditors. And where the creditors have been denied the right to receive their principal debt when due, and through good management or good fortune, a surplus exists, it is more consonant with the equitable principles of bankruptcy that the surplus be used to pay interest to the creditors rather than that it be turned over to the bankrupt."

In Mr. Bailie's said affidavit, at Reporter's Transcript 615, it is pointed out that no fees for the Trustee's attorneys have been applied for or approved (a) for any services rendered by said attorneys in connection with the proceedings for the sale of the assets to Mr. Colter or to Mr. and Mrs. Colter; or (b) for any services rendered by said attorneys subsequent to October 31, 1953. There also remain to be allowed and paid (1) the costs and expenses of the pending litigation, including attorneys' fees, and (2) the usual Referee's and Trustee's fees, which have accrued and will continue to accrue until the bankrupt estate is fully wound up and finally settled. It is safe to assume that pending that event fees, costs and expenses will aggregate many thousands of dollars.

Section 22 of Article XX of Treadwell's Constitution of California, as amended on November 6, 1934, so far as applicable reads:

> "Art. XX, §22. Interest rates. (See preceding section bearing same number.*) The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be seven per cent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding ten per cent per annum."

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*An earlier section of this Article XX, pertaining to "Intoxicating Liquors," was adopted in 1932, so that there presently appear under Article XX two Sections 22.

The law applicable to the allowance of interest on allowed claims, where there is more than sufficient to pay the principal of such claims, is concisely set forth in 6 American Jurisprudence, at pages 840-841, Section 494, as follows:

> "Sec. 494.—Surplus of Assets over Claims.—If it should happen, as it rarely does in bankruptcy, that the assets are sufficient to leave a surplus after payment of all claims in full, interest is allowable on claims duly proved and allowed from the date of the filing of the petition in bankruptcy to the date of payment. Interest on claims accruing after the filing of the petition in bankruptcy is payable before the distribution of surplus to the bankrupt, although the contracts upon which the claims are based do not expressly provide for interest, and no demand for after-accruing interest was made by claimant. The trustee is entitled to retain possession of the assets until he has accumulated funds enough to satisfy such interest. It has been held further that interest should be computed according to the ordinary rule for the computation of interest where partial payments have been made on an interest-bearing debt—that is, a payment is first to be applied to discharge the interest then due on the principal obligation, and the remainder in reduction of the principal indebtedness. The bankrupt cannot object to the payment of interest accruing on claims from the time of filing of the petition, where there is a surplus remaining after the payment of all claims proved, on the ground of the discharge granted him in bankruptcy.
>
> "The allowance of a claim in bankruptcy is a judgment within the rule that judgments in the courts of the United States bear the same rate of interest as judgments in the courts of the state, respectively, where they are rendered."

The California case of *Greva v. Rainey,* 2 Cal. 2d 338, at 342-343, follows the principles quoted in the above text. We quote briefly therefrom:

> "At common law interest was not recoverable. (See National Bank of the Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 437, 24 L. Ed. 176.) In cases where the special statute involved is silent on the question of interest, a host of authorities appears to have settled the question by the application of the general statutes providing for interest in upholding the right of the creditors to recover interest on their claims whenever a surplus of corporate assets remains, before any distribution of such surplus assets is made to the stockholders of the corporation.
>
> "In the case of State v. Park Bank & Trust Co., 151 Tenn. 195, 268 S. W. 638, 29 A. L. R. 449, * * * it was also decided that demand for such interest is unnecessary, but that the interest was properly computed from the date of suspension of business. That case and the cases cited in the annotation following the report in 49 A. L. R., at pages 457 *et seq.,* disclose that the general rule that after property of an insolvent is *in custodia legis* interest thereafter accruing will not be allowed, is not applicable where the assets of the debtor are sufficient to pay the claims with interest. * * *
>
> "In Johnson v. Norris, 190 Fed. 459, 111 C. C. A. 291, L. R. A. 1915B, 884 (certiorari denied, 232 U.S. 723, 34 Sup. Ct. 479, 58 L. Ed. 815), it is pointed out that were the rule otherwise the extraordinary result would follow that a delay in payment brought about by a proceeding to liquidate assets to satisfy the claims of creditors would prevent the creditors' collecting interest from an estate able to pay it, when the general law is that interest is given for delay

in payment. The remark made by the court in Brown v. Lamb, 6 Met. (Mass.) 203, that 'he becomes in fact a solvent debtor, and his duties and obligations are the same with those of other solvent debtors', becomes pertinent in any case involving a liquidation proceeding where sufficient assets remain to pay interest on the claims of creditors and there is no express statutory provision withholding application of the general laws that interest at the legal rate is payable."

Greva v. Rainey, supra, at page 344, discusses the cases of *People v. American Loan & Trust Co.,* 172 N. Y. 371, 65 N. E. 200, and *People v. Merchants' Trust Co.,* 187 N. Y. 293, 79 N. E. 1004, as follows:

"In commenting upon the statement in People v. American Loan & Trust Co., *supra,* that 'if the assets are sufficient to pay all, including interest, it must be paid, for, as against the corporation itself, interest should be allowed before the return of any surplus to the stockholders,' the court in People v. Merchant's Trust Co., *supra,* said: 'It may be admitted that these remarks were unnecessary to the disposition of the case then under consideration, but the rule thus asserted appears to us to be so eminently just and so well supported by other authority that we now have no hesitancy in adopting it as the rule that should be adhered to in disposing of questions of this character,' citing other cases."

Greva v. Rainey, supra, is quoted from and followed by the Ninth Circuit Court of Appeals in the case of *Kiyoichoi Fujikawa v. Sunrise Soda Water Wks. Co.,* 158 F. 2d 490 (1946). In this last case the Supreme Court of the United States denied an application for a writ of certiorari (331 U. S. 832, 91 L. Ed. 1846). On January 12,

1948, the same court denied a motion for leave to file a second petition for a rehearing. (332 U. S. 853, 92 L. Ed. 422.)

Petitioner appears to urge that the unsecured claims were not allowed until long after bankruptcy, and should not in any event bear interest prior to the court order formally allowing them.

We think petitioner has a false conception respecting the allowance of such claims. It is our position that a sworn proof of claim is allowed when filed except to the extent that objections thereto are subsequently sustained; that the hearing is on the objections and not on the claim; and, that the claim, to the extent not affected by the sustained objections stands and bears interest from the date that the petition in bankruptcy was filed.

In *Edward B. Whitney, as Trustee in Bankruptcy of Dresser & Co. v. Emma B. Dresser,* 200 U. S. 532-535, 50 L. Ed. 584-585, it is said:

> "The only question warranting the appeal is whether the sworn proof of claim is ***prima facie*** evidence of its allegations in case it is objected to. It is not a question of the burden of proof in a technical sense,—a burden which does not change, whatever the state of the evidence,—but simply whether the sworn proof is evidence at all.
>
> "The circuit court of appeals observed that the proof of claim warrants the payment of a dividend in the absence of objection, and, therefore, must have some probative force. In reply it is argued that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment

may be entered on a declaration for want of an answer, yet a declaration is not evidence; that it is contrary to analogy to give effect to an *ex parte* affidavit, and that, on general principles, it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross-examination.

"Notwithstanding these forcible considerations, we agree with the circuit court of appeals. The prevailing opinion, not only in the second circuit, but elsewhere, seems to have been that way." (Citing cases) . . . "The alternative would be that the mere interposition of an objection by any party in interest (§57d) would require the claimant to produce evidence. For if the formal proof is no evidence, a denial of the claim must have that effect. If it does not, then the formal proof is some evidence, even when there is testimony on the other side. The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue. The words are: 'Objections to claims shall be heard and determined as soon,' etc. §57f. It is the objection, not the claim, which is pointed out for hearing and determination. . . . We believe that the understanding of the profession, the words of the act, and convenient and just administration, all are on the side of treating a sworn proof of claim as some evidence, even when it is denied."

This decision was followed in *Gardner, Trustee v. State of New Jersey,* 329 U. S. 565, 572, 91 L. Ed. 504, 514 (1946).

Another case which shows that if there is a surplus remaining after the payment of allowed claims, interest

must be paid, is the case of *Johnson v. Norris,* 190 Fed. 459, where at 462 it is said:

> "With the exception of property exempt under state laws from liability for debts, the bankruptcy act provides for the distribution of the bankrupt's entire estate among his creditors. The only reference in the act to returning any of the estate to the bankrupt relates to unclaimed dividends. Dividends that remain unclaimed for six months after the final dividend has been declared are to be paid by the trustee into court; and dividends unclaimed for one year are, under the direction of the court, to be distributed to the creditors whose claims have been allowed, but not paid in full, and after such claims 'have been paid in full, the balance shall be paid to the bankrupt.' (Bankruptcy Act, §66.)"

In the same case at page 464, the court continued:

> "The facts are not very clearly and fully stated in *Re* John Osborn's Sons & Co., 177 Fed. 184, 100 C. C. A. 392, 29 L. R. A. (N. S.) 887; but the statement is sufficient to show that certain claims based on accounts had been proved against the bankrupt's estate and paid in full by dividends, and that the controversy was as to whether a surplus should be paid to the bankrupt or be used in paying interest on the claims, including interest which accrued subsequent to the allowance of the claims. The court, deciding that the proof and allowance of the claims were, in effect, judgments, held that they were entitled to be treated as judgments, and, as such, interest accruing both before and after their allowance should be paid on the claims. And National Bank of Commonwealth v. Mechanics' National Bank, 94 U. S. 437, 24 L. Ed. 176, is cited as sustaining this view by analogy. The Osborn case is the only one to which

our attention has been called, involving the distribution of a surplus, that has arisen under the present bankruptcy act."

Certiorari was denied by the United States Supreme Court in *Johnson v. Norris, supra* (232 U. S. 723, 58 L. Ed. 815).

Petitioner in Its Point III, Page 45, of Its Petition for Writ of Certiorari, Relative to the Dismissal of Petitioner's Proposed Plan of Reorganization Under Chapter X, Is Not Well Taken for Two Reasons, Namely, (1) the Purported Appeal Herein Involved Does Not Purport to Be an Appeal Therefrom, and (2) the Order of Dismissal Has Long Since Become Final.

The petition under Chapter X [D 314] was filed January 19, 1954. The order of dismissal [D 331] was filed on April 20, 1954. The notice of the purported appeal to the Court of Appeals [D 560] makes no reference whatever to said order of dismissal.

Said order of dismissal was authorized by Bankruptcy Rule 218, paragraphs (a) and (b) of the United States District Court for the Southern District of California.

The making of said rule was authorized by General Order 56, and by Rule 83 of the Federal Rules of Civil Procedure.

Petitioner's Contention Under Point VI, Page 55 of Its Petition for Writ of Certiorari to the Effect That the District Court Erred in Directing a Sale in Solido Rather Than in Separate Parcels, Has No Foundation Upon Which to Rest.

This contention is adequately answered, we think, by the following from pages 122-123 of the record. [R. 122-123.]

> "The Referee: What was your last bid?
>
> Mr. Snyder: $406,500.
>
> The Referee: Well, if Mr. Colter should fall down we might call upon you suddenly. So it is the old story, while there is life there is hope.
>
> Now, are there any further bids for separate parcels, for any of this property, to be made? If so I want it done now. Hearing none, I think the next order of business is to go ahead with the objections presented by Mr. Cahill on behalf of certain creditors and also on behalf of the bankrupt."

The Bankrupt Was Not in Anywise Injured (1) by the Fact That Mr. Neblett Represented Mr. and Mrs. Colter on the Purchase of the Unliquidated Assets; or (2) by the Fact, if It Be a Fact, That Mr. and Mrs. Colter Were Acting for Themselves and as the Undisclosed Agent for One or More Associates.

Petitioner in its Point XI, page 60 of its petition for writ of certiorari, insinuates some suspected wrongful or fraudulent act on the part of Colonel Neblett, but fails to specifically point out any such act.

Mr. Bailie's affidavit [R. 603] shows that Colonel Neblett never represented the bankrupt in any of the bankruptcy proceedings. [R. at 614.]

The fact that he had incorporated the bankrupt, and the fact that the receiver or trustee employed Mr. Neblett to complete the defense of certain litigation pending in the state courts, which he handled successfully [R. 637], should not be held to bar him from representing the purchasers from the bankrupt's successor in interest, the Trustee, who was acting under a final order of liquidation made by the bankruptcy court.

Petitioner in its Point XII, page 62 of its petition for writ of certiorari, claims that the Court of Appeals erred by failing to remand the case for the purpose of taking further testimony upon the purported allegations of fraud.

There is no allegation that any fact of a confidential nature was ever communicated to Colonel Neblett, nor that he made use of any such confidential information in his representation of the Colters; nor is there any allegation of fact which, if proven, would constitute actionable fraud.

Fraud is never presumed and it is elementary that one against whom a charge of fraud is made is entitled to a specific averment of the facts claimed to constitute the fraud. This principle is stated in 12 California Jurisprudence page 800, Section 62 as follows:

> "Sec. 62. Necessity of Pleading Facts.—Fraud is never presumed. Whenever fraud constitutes an element of a cause of action or defense which is of an affirmative nature the facts must be alleged. One against whom charges of fraud are made is entitled to specific averments of the acts of which he is accused, so that he may admit or deny them, and thus present real issues."

Another basic principle is that even if fraud is properly pleaded, no cause of action exists in the absence of an allegation of damage. (See *Rosenberg v. Lawrence,* 10 Cal. 2d 587, 590.) The amended bid was made by Mr. and Mrs. Colter, they qualified before the Referee, the sale was made to them after spirited bidding at public auction, no fraudulent acts have been alleged, and no damage to the bankrupt estate or to the bankrupt has been shown.

What we have said respecting clause (1) in the above title is equally applicable to clause (2) here under discussion.

Conclusion.

While we have not taken up under separate headings all of the points set forth in petitioner's petition to this court, we believe we have adequately covered all points which merit any discussion.

When all of petitioner's claims have been considered, these facts are made clear: (1) That the bankrupt, purporting to act through Mr. Newport, has persistently sought and is now seeking to prevent any sale of the assets of the bankrupt estate; (2) that the bankrupt, purporting to so act, has been and is by baseless claims and in every conceivable manner seeking to prevent the Trustee from performing the duties resting upon him under (a) the Bankruptcy Act and (b) the final order for the liquidation of the assets of the bankrupt estate; and (3) that if the bankrupt be permitted to prosecute successfully its petition for a writ of certiorari herein, the result will be to require the Trustee to use a substantial portion of the assets, which would otherwise be available for the credi-

tors, with which to pay the costs, expenses, printing charges, etc., including attorneys' fees, incident to a hearing of the purported appeal on the merits. This is inconsistent with the spirit and purpose of the Bankruptcy Act which requires a prompt liquidation of the assets and the distribution of the available proceeds among the creditors. (Sec. 47 of Bankruptcy Act of 1938, U. S. C., Title 11, Ch. 5, Sec. 75.) If this claimed right of appeal is upheld, any bankrupt can review every order confirming and appeal from every order affirming the sale of any asset, thus forcing the Trustee to exhaust the assets of the bankrupt estate in litigating such reviews and appeals, thereby depriving the creditors of the rights given them under the Bankruptcy Act.

Respectfully submitted,

BAILIE, TURNER, LAKE & SPRAGUE,
By NORMAN A. BAILIE,
NORMAN A. BAILIE,
RICHARD A. TURNER,
Attorneys for Respondent, Paul W. Sampsell, as Trustee,

FILED
MAR 23 1955
HAROLD B. WILLEY, Clerk

No. 590

IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

F. P. NEWPORT CORPORATION, LTD.,
Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. NEWPORT CORPORATION, LTD., Bankrupt,
Respondent.

ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WESTERN PRINTING COMPANY, WHITTIER

TOPICAL INDEX

	Page
The Opposition Incorrectly Sets Up Matters of Law and Fact	2
Can the Trustee Defeat an Appeal by His Failure or Negligence to Act?	5
Appendix A	App. 1
Findings of Fact, Conclusions of Law, and Order Authorizing Sale of Real and Personal Property and Confirming Sale of Real and Personal Property to R. T. Colter and Robbie E. Colter His Wife, as Joint Tenants	App. 1
Findings of Fact	App. 3
Conclusion of Law	App. 12
Order	App. 13
Appendix B	App. 33
Order Affirming Order of Referee Confirming Sale of Real and Personal Property to R. T. Colter and Robbie E. Colter His Wife as Joint Tenants	App. 33
Appendix C	App. 35

TABLE OF CASES AND AUTHORITIES CITED

Cases

Bahen and Wright v. Commissioner, 176 Fed. (2d) 538, 539 (4th Cir.)	6
New York v. Saper, 336 U. S. 328, 330, 93 L. Ed. 710, 714	9
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158	5

Page

U. S. v. P. F. Collier & Son Corp., 208 Fed. (2d) 936 (7th Cir.) 6

Vanston Bondholders Protect. Com. v. Green, 329 U. S. 156, 163, 91 L. Ed. 166 9

Watts v. Liberty Royalties Corporation (10th Circ.), 106 Fed. (2d) 941, 944 6

Statutes

Delaware Statutes, Title 8, Section 312 ..... 4, 5, 8, 9

Delaware Statutes, Title 28, Section 1651 8

Acts

Bankruptcy Act, Chapter 1, sub-section 7 5

Chandler Act 9

Rules

Supreme Court, Rules 19 (b), 21 ..... 2, 7

Supreme Court, Rule 31 8

IN THE

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F. P. NEWPORT CORPORATION, LTD., *Petitioner,* vs. PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. NEWPORT CORPORATION, LTD., Bankrupt, *Respondent.*	No. 590

ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Opposition to our Petition for Writ of Certiorari points up the importance of the questions raised by the petition, never heretofore decided by this Court and in conflict with decisions of other Court of Appeal and in conflict with the Laws of the State of Delaware.

Certiorari should therefore be granted in accordance with Rule 19B Rules of the Supreme Court of the United States.

THE OPPOSITION INCORRECTLY SETS UP MATTERS OF LAW AND FACT

While it is correct that several grounds of dismissal were presented in the written Motion to Dismiss the Appeal, they centered around the proposition that the franchise tax for the corporation had not been paid to the State of Delaware since April 1st, 1937, and that therefore the corporation had no legal capacity to prosecute the appeal. This was the basis of the entire argument in the United States Court of Appeals for the Ninth Circuit at the time Motion for Dismissal (which argument was not reported) and in which it was pointed out to the court that the appellant, as *cestui que* trust, has and had a substantial financial interest in the outcome of the appeal, especially if interest was improperly allowed or should not have been allowed by the Referee and that the appellant corporation would be made whole. After the payment of $187,000.00 in debts to the unsecured creditors and other expenses, there would still be a substantial sum left to the appellant.

The opposition fails to point out that all the proceedings held before the Referee and all proceedings held in the United States District Court were of a character in which the appellant herein (the corporation) proceeded on its merits; that the Referee heard

the matter on its merits and also the District Judge, and that an effort which was made before the District Judge to deny an extension of time and deny proceedings on appeal were denied by him. Thus, although two District Judges and the Referee treated the corporation as a going concern and operating under court permission, and the proceedings on which certiorari is sought were treated before the Referee and in the District Court as properly before it, the corporation was nevertheless denied an appeal by the Court of Appeals by its dismissal of the appeal without ruling on the merits of the issues raised on the appeal. This is a very important question in the law of Bankruptcy which has not been passed upon by this Honorable Court.

Other grounds for the dismissal which were set out in its Motion to Dismiss, equally, raised important questions of Bankruptcy Law.

I

Has Congress deprived the bankrupt of its right to appeal where the case is heard on its merits in the District Court and before the Referee? Does it have standing on appeal, the same as it did in the District Court and before the Referee, to have its issues determined on appeal, especially where it may be the beneficiary of $200,000 or more if the appeal is decided in its favor?

II

If the Trustee has been negligent, or willful, in failing to pay the state franchise tax, can this deprive the appellant of his right to appeal, especially when the District Court has authorized the corporation to do business and that corporation has operated as a going business concern under a state franchise tax from the State of California—it being a Delaware Corporation?

We may state that we made a demand upon the Trustee to pay the Delaware State taxes, which demand was refused and his refusal approved by the Referee recently, and the District Court March 14th, 1955.

Compliance with that demand, under Delaware Law, would reinstate the corporation under Title 8, Section 312 of the Delaware Statutes, and would revive its charter "together with all the rights, franchises, privileges and immunities and subject to all of its duties, debts and liabilities which had been secured or imposed by its original charter and all amendments thereto." All that the Trustee would have to do would be to pay $471.25.

CAN THE TRUSTEE DEFEAT AN APPEAL BY HIS FAILURE OR NEGLIGENCE TO ACT?

A corporation, either *de jury* or *defacto,* has authority to secure counsel to handle the appeal—counsel who are authorized to appear and act in the Supreme Court of the United States or in the United States Circuit Court. There is nothing in the Bankruptcy Act which bars a corporation, even though its charter has expired, from securing counsel to protect its rights and reinstate it. Otherwise, Section 312 of Title 8 of the Delaware Statutes would be meaningless. Also sub-section 7 of Chapter 1 of the Bankruptcy Act would be meaningless.

Congress has provided that all of the rights of a bankrupt shall be preserved equally with those of all of the other parties. That is the spirit and purpose of the Bankruptcy Act. Even a condemned man, who has lost his civil rights, is allowed counsel; in fact is required to be furnished with counsel if he is unable to secure the same.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158.

The same rule is true with reference to a corporation. It should have all of its rights preserved in any event.

The respondent has listed nine points as "Reasons" for denying the writ. Most of them are unsupported by authority. The first point is: "1. The Ninth Circuit Court of Appeals has not rendered a decision in conflict with the decisions of another court of appeals in the same matter." (Res. Br. 2). We cited in our

Opening Brief three cases, none of which have been answered in this Brief in Opposition. These cases are: *Watts v. Liberty Royalties Corporation* (10th Circ.) 106 Fed. (2d) 941, 944; *U. S. v. P. F. Collier & Son Corp.,* 208 Fed. (2d) 936 (7th Cir.), and *Bahen and Wright v. Commissioner,* 176 Fed. (2d) 538, 539 (4th Cir.). And, as to their other numbered "Reasons", we set out:

2.

The United States Court of Appeals for the Ninth Circuit decided this case contrary to the state law of the State of Delaware, as well as to the United States courts. This has not been met with any authority. See: *Watts v. Liberty Royalties Corporation,* (10th Cir.), 106 Fed. (2d) 941, 944; *U. S. v. P. F. Collier & Son Corp.,* 208 Fed. (2d) 936, (7th Circ.), and *Bahen and Wright v. Commissioner,* 176 Fed. (2d) 538, 539 (4th Cir.).

3.

We have pointed out the important questions of Bankruptcy Law involved in this case, which should be settled by the United States Supreme Court. No case in this Court has raised these fundamental questions.

4. 5.

The right of the bankrupt corporation, which is a *cestui que* trust, and may be the beneficiary of $200,000.00 or more, to appeal its case is before this Court.

The issues have been heard and decided on their merits in the District Court, without a disqualification on the part of the corporation to act for want of payment of the franchise tax. The right of the corporation, which was given the power to do business by the District Court, to appeal any adverse decision is also involved, and other questions of importance in the administration of bankruptcy as set out in our Opening Brief—particularly its right to interest in the amount, and the date from which that interest should apply.

These are important questions of federal law not heretofore decided by this Court.

On the question of interest, we think that the decision is contrary to the decisions of this Court. We also think that the United States Circuit Court of Appeals for the Ninth Circuit has departed from the accepted usual course of procedure in this matter in deciding the case on a technical motion and not on its merits. (Supreme Court Rule 19 (b).)

6. 7.

We have set out each point with accuracy and clarity and with argument, as required by the New Rules of the United States Supreme Court (Rule 21), and we have set out the matters necessary for the determination of the points.

8.

Point 8 is a misunderstanding of the law. We did not apply for an *extraordinary writ* under Section 1651

of Title 28. We applied for certiorari from the decision of the United States Court of Appeals for the Ninth Circuit dismissing the appeal. Therefore, we do not proceed under Rule 31.

9.

The Petition for Writ has the opinion of the Court of Appeals dismissing the appeal. The Memorandum Opinion of the referee; his findings of fact and his order authorizing and confirming the sale, and the previous order on review, and the order dismissing the petition under Chapter X were not heard or determined by the Court of Appeals. They are attached in the appendix herewith and show that those courts considered the rights of the corporation on its merits, made findings and conclusions against it on the merits. The Court of Appeals merely determined the Motion to Dismiss our appeal, which it labelled "PURPORTED" without reviewing the merits determined below.

While we do not understand, under those circumstances, that the Rules require us to set up the previous decisions which do not go to the question of the dismissal of the appeal and were not heard on those questions in the appellate court below, they are in Appendix A and B.

We have raised all of the other questions in our Petition that we deemed are involved in the appeal so that all questions might be presented to this Court.

The statement in the Opposition that, "There is no Delaware Statute which provides that a defunct cor-

poration would be revived if the Trustee were to pay Delaware's Claim No. 32 for $471.25 [R. 633-635], or the Delaware franchise taxes with or without penalties, for which bankrupt's charter was forfeited on April 1, 1937", is directly contrary to Title 8, Section 312, of the Delaware Statutes and Federal Cases construing the same.

The statement in the Opposition that, "The appellant has sought to prevent the sale of the assets", is not supported by the record. There is no stay of the proceedings of the sale below, and the parties have been at liberty to carry out the agreement, if they were so advised, at any time. The sale was without strings and there was and is no stay regarding the sale. If the respondent wishes to carry out the sale, there is nothing to stop him from it.

Respondent has discussed at length the important question of allowing interest (approximately 135 per cent in this case). Congress has not so provided in the Chandler Act, nor any amendment. It is for Congress to so determine. The absence of Congressional Command is a directive that none was intended. Not even tax claims to the government have been given this preference.

New York v. Saper, 336 U. S. 328, 330, 93 L. Ed. 710, 714;
Vanston Bondholders Protect. Com. v. Green, 329 U. S. 156, 163, 91 L. Ed. 166.

Elimination of interest would make this successfully operated corporation in bankruptcy administra-

tion solvent and perform an important function in bankruptcy and entitle the corporation to a dismissal of the bankruptcy proceeding as a solvent corporation.

The equity of the stockholders require the solicitude of the Court. The Trustee is not permitted to ravage the funds of the estate to the exclusion of the corporation that made it possible by the payment of uncalled for interest and by huge fees to attorneys and administrators.

These questions point up the great importance of this case in the administration of the law of bankruptcy.

We pray for certiorari.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioner.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of F. P. NEWPORT CORPORATION, LTD., a corporation, Bankrupt	))))	In Bankruptcy No. 25308-M

FILED May 3, 1954

At 30 Min. past 4 o'clock P. M.

HUGH L. DICKSON, Referee

....., Clerk

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AUTHORIZING SALE OF REAL AND PERSONAL PROPERTY AND CONFIRMING SALE OF REAL AND PERSONAL PROPERTY TO R. T. COLTER AND ROBBIE E. COLTER HIS WIFE, AS JOINT TENANTS.

Paul W. Sampsell, the Trustee in bankruptcy of this estate, having filed herein on March 15, 1954, his amended and suuplemental petition for authority to sell all the real and personal property of the estate, except cash and cash accumulations, to R. T. Colter and Robbie E. Colter his wife, as joint tenants, for $350,564.15 without any conditions, and on April 5, 1954, the bankrupt corporation and Mrs. F. P. New-

port, Matilda Olsen, Martha T. MacMillan by Fay MacMillen Pender her attorney in fact, Dorothy Day, Eugene P. Clark and Addie E. Hurlburt Garland, creditors of the bankrupt estate, having filed objections to such proposed sale, and ten days notice of the time and place of the hearing of the said amended and supplemental petition and of the proposed sale having been given to the creditors pursuant to the provisions of Section 58a(4) of the Bankruptcy Act, and the undersigned Referee in Bankruptcy, Reuben G. Hunt, having taken over this matter at the request of Referee in Bankruptcy, Hugh L. Dickson, pursuant to Bankruptcy Rule 207a of this Court, and hearings having been had before the undersigned Referee on April 6, 7, 8 and 9, 1954, upon the said petition and the objections thereto, and the following appearances having been made: Paul W. Sampsell, Trustee: Bailie, Turner, Lake & Sprague by Norman A. Bailie, Esq., and George Bouchard, Esq. Tax Counsel for said Trustee; Edmund Nelson, Esq. and Winfield Jones, Esq. attorneys for Bank of America, a creditor; L. M. Cahill, Esq., attorney for Objectors; Aaron Levinson, Esq. attorney for Aaron Levinson and Louis Schulman, creditors; Wm. H. Neblett, Esq. attorney for R. T. Colter and Robbie E. Colter his wife, as joint tenants, bidders; Messrs. Flint & MacKay, attorneys for Los Angeles Investment Company, a creditor; and oral and documentary evidence having been received upon said hearing and other bids for the property having been received and entertained, and oral and documentary evidence having been received respecting the issues raised by the said petition and the objections

thereto; and the matter having been submitted to the Referee for decision,

The Referee hereby makes the following:

FINDINGS OF FACT

I

This is an involuntary bankruptcy proceeding commenced March 10, 1935. On March 25, 1935, the Court appointed and qualified H. F. Metcalf, as Receiver in Bankruptcy. An adjudication in bankruptcy was made on January 12, 1937, and the case referred for administration to Ernest R. Utley, a Referee in Bankruptcy of the Court. On February 28, 1945, the case was transferred to Referee in Bankruptcy Hugh L. Dickson of this Court, who is still in charge of the administration of the estate. The bankrupt's schedules were filed February 5, 1937. The assets of the estate consisted principally of real estate in the Los Angeles and Long Beach areas, oil produced from wells at Long Beach, and a small tract of land in Tulare County, California. The Security-First National Bank of Los Angeles held most of these properties under a trust agreement as security for loans and advances amounting to over a million dollars. On February 25, 1937, H. F. Laugharn was appointed and qualified as Trustee in Bankruptcy by Referee Utley. This appointment, however, was disaffirmed and set aside on March 18, 1937, by Judge McCormick of the above entitled Court who declared H. F.Metcalf to be the duly elected Trustee in Bankruptcy. This order

of Judge McCormick was affirmed on appeal. (*In Re F. P. Newport Corp.,* CCA 9, 35 ABR N.S. 391, 93 F. (2) 630.) H. F. Metcalf duly qualified as Trustee and acted as such until shortly before November 20, 1950, when Paul W. Sampsell, the present Trustee, was appointed and qualified as Trustee in his place and stead.

Trustees Metcalf and Sampsell, respectively, operated the bankrupt's business, with the permission of the Court (B. A. Sec. 2a(5), until May 26, 1952, when an order of liquidation was entered by Referee Dickson, which order was confirmed on review by Judge McCormick on November 28, 1952. The petition for that review was filed and prosecuted by the bankrupt and the same creditors who are the objectors upon the present proposed sale. The order of Referee Dickson, so confirmed, directed the Trustee:

> " . . . to proceed with all due diligence to sell the assets of said estate . . . to the end that the assets of said estate may be speedily converted into money, the expenses of administration paid, the residue paid to the creditors as required by law and the estate closed."

II

Trustees Metcalf and Sampsell, respectively, engaged in the business of leasing oil properties, inspecting their operation, and collecting various kinds of income therefrom. While operating that business they paid federal and state income taxes. See *U. S. v. Metcalf,* CCA. 9, 51 ABR, NS 727, 131 F. (2) 677.

During such operation the obligation due the Security-First National Bank of Los Angeles was satisfied and discharged and various small portions of the real properties of the estate were sold. A history of the administration of the estate is contained in the reports and accounts filed by the Receiver and Trustee Metcalf and by Trustee Sampsell.

III

On February 11, 1953, A. S. Menick, an appraiser appointed by the Court, filed his appraisement of certain personal property of the estate, consisting of office furniture and fixtures, which he appraised at $575.00.

On September 21, 1953, A. A. Carrey, a similar court appraiser, filed his appraisement of oil royalties growing out of land owned by the estate at Long Beach, his appraisement totalling $95,650.00.

On November 19, 1953, A. S. Menick and H. A. Sheedy, similar court appraisers, filed their appraisement dated November 17, 1953, of a parcel of land in Tulare County, California, at $7,500; acreage in the Verdugo Woodlands Tract in the City of Glendale at $370,505.00 and real estate at Long Beach, out of a portion of which the oil royalties arose, at $130,680.00. The latter named appraisers filed on April 12, 1954, a reappraisement of such properties but reported that in their opinion the values they originally reported were unchanged by the lapse of time, except that the appraisal of $130,680.00 for Parcel 24 (Long Beach oil property) of their appraisal of November 17, 1953, could be decreased by possibly 25% due to land sub-

sidence in the Long Beach area and nonuse of the surface rights until after 1963.

The total of all of said appraisements, to wit, $604,910 may well be reduced to $548,259.29 by reason of an interim sale of one lot at Long Beach (Parcel No. 17 appraised at $2500 in the Menick-Sheedy appraisement) by Trustee Sampsell, the collection of $21,480.71 by him of oil royalties since the Carrey appraisement was filed, and a 25% reduction of the Long Beach oil property appraisement of $130,680.00 to $98,010 by reason of continued land subsidence in that vicinity and the inability of a purchaser to use the surface rights until 1963.

The assessed values of the real properties of the estate for the fiscal year 1953-54 was $104,010.00.

IV

On November 3, 1953, Trustee Sampsell filed his petition for authority to sell and for confirmation of sale of real and personal property to R. T. Colter, a married man. This included the remaining assets of the estate, real and personal, except cash on hand. The bid of R. T. Colter contained a condition to the effect that he was to have the benefit of all cash received by the Trustee after August 18, 1953. On November 20, 1953, the bankrupt and the following general unsecured creditors of the bankrupt estate, Mrs. F. P. Newport, Matilda Olsen, Martha T. MacMillen by Fay MacMillen Pender her attorney in fact, Dorothy Day, Eugene P. Clark and Addie E. Hurlburt Garland, the same parties who objected to the liquidation order,

filed objections to that proposed sale. A hearing on the said petition for sale was held before said Referee Hugh L. Dickson. On November 23, 1953, after due notice of the time and place of the said hearing and of the proposed sale had been given to the creditors of the bankrupt by mail, pursuant to the provisions of Section 58a(4) of the National Bankruptcy Act. On December 9, 1953, Referee Dickson entered his findings of fact, conclusions of law and order confirming said proposed sale of November 3, 1953. On December 18, 1953, the same objectors filed their petition for a review of that order. This review was heard by Judge McCormick of the above entitled Court on January 19, 1954, and January 29, 1954. On February 9, 1954, Judge McCormick entered an order which neither reversed nor affirmed the Referee's order of confirmation, but recommitted the proceeding to the Referee to conduct a further formal hearing and endeavor to procure a "firm, positive, definite and certain bid" for the property.

V

At the hearings before the undersigned Referee there was active competitive bidding for the property as a whole between William Berk, E. P. Snyder and the Colters, the latter presenting the highest and final bid of $407,000.00. The next was that of E. P. Snyder for $406,500.00. These bidders all qualified as to their financial responsibility to carry out any accepted bid. This final bid of the Colters was without condition. The only bids for separate parcels were those (1) of M. B. Glenn of $5,000 for certain lots in the Verdugo

Woodlands Tract, out of which he wanted a 5% realtor's commission; (2) of H. W. Williams of $5,000 for the Tulare County property; and (3) of D. P. Harlow who dealt in oil royalties, of $150,000 for the Long Beach royalties, with the condition that they be delivered to him in the near future. With respect to this last named bid, it was not specified therein what "near future" meant, nor was any evidence presented to show that the bid was bona fide, or that D. P. Harlow was financially able to respond if his bid was accepted. No other bids for separate parcels are available.

VI

It was agreed by the parties, with the approval of the undersigned Referee, that the date of the confirmation of a sale by the Referee's signed and final order would be the line of cleavage so far as subsequent income was received by the Trustee from the oil royalties, in the event the order of confirmation did not become final for a future period owing to reviews and appeals. The Trustee accepted the final bid of the Colters of $407,000.00 for the property as a whole, except cash and cash accumulations, and recommended its confirmation. Thereupon, the Colters paid the Trustee $40,700 as a guarantee that they would pay him the balance of $356,300 on confirmation.

VII

The amount of general allowed claim against the bankrupt estate is the sum of $187,906.84. There are $750 in priority labor claims also to be paid. The

total unsecured claims, general and priority, is thus $188,656.84. On January 7, 1954, the U. S. Government filed a deficiency claim for income taxes in the sum of $11,970.13. On March 24, 1954, Referee Dickson disallowed this claim. The time within which may be filed a petition to review his said order has not yet expired.

VIII

On January 19, 1954, the bankrupt corporation filed herein a petition for reorganization under Chap-X of the Bankruptcy Act. This petition was dismissed by the above entitled Court on April 20, 1954, pursuant to Bankruptcy Rule 218b of this Court.

IX

The new and final offer of $407,000.00 of R. T. Colter and Robbie E. Colter his wife, as joint tenants, is without condition, and is not substantially or at all the same offer as that presented by R. T. Colter through Trustee Sampsell on November 3, 1953. It constitutes a firm, definite, positive and certain bid in accordance with the order of Judge McCormick on February 9, 1954. The value of the properties of the estate as reported by the Court appraisers and as modified down to date, to wit, $548,259.29 is a fair value. The final bid of the Colters of $407,000.00 being approximately 75% of such appraised valuation is the fair market value and is not inadequate, and is not so disproportionate to the appraised value as would warrant a rejection of such a bid.

X

The values of the Verdugo Woodlands acreage have not greatly or at all increased since the court appraisement thereof.

XI

Separate, firm, unconditional, adequate cash bids cannot be obtained for the separate parcels of the estate which, in the aggregate, will exceed the said bid of $407,000 for the property as a whole, except cash and cash accumulation.

XII

The real and personal property proposed to be sold by the Trustee does not have a fair market value of $800,000 or any other sum in excess of $407,000. More than $407,000 for the property as a whole, or for separate parcels in the aggregate, cannot be obtained within a reasonable time.

XIII

It is for the best interests of the bankrupt estate, and its creditors, that this new and final bid of the Colters for $407,000.00 accepted and recommended by the Trustee for confirmation, be confirmed by the Court.

XIV

The real and personal property now proposed to be sold by the Trustee has been sufficiently advertised. The Court did not direct any particular kind of advertising, or any advertising at all. The Trustee has made

diligent efforts to sell the said real and personal property, either in separate parcels or as a whole. Even if the advertisements of the proposed sale by the Trustee were defective, still the final bid of the Colters for $407,000 is fair and adequate, and the best price that can be obtained under the circumstances.

XV

No evidence was produced to the effect that any financially substantial person is willing to advance money to the bankrupt corporation to pay expenses of administration and creditors claims in full, plus interest. The objectors have had ample opportunity to produce persons who will pay cash for all or any of the properties of the bankrupt estate.

XVI

The confirmation of this present bid of the Colters will result in the payment of the balance of expenses of administration and the payment to the unsecured creditors of the principal and a large part, if not all, of interest on their claims. Simple interest on these claims at 7% per annum, the rate of judgments in California State Courts, is $250,913.59.

From the foregoing Findings of Fact the Referee makes the following:

CONCLUSIONS OF LAW

I

The Referee has jurisdiction to hear and determine the said amended and supplemental petition of the Trustee, but it is necessary, in order to clear the record, that the confirmation of the original bid of R. T. Colter made by Referee Dickson be vacated and set aside.

II

Each and all of the objections advanced by the objecting creditors of the bankrupt are without merit and should be overruled.

III

The present offer of the Colters in the sum of $407,000.00 for all of the assets of the estate, except cash and cash accumulations, should be confirmed.

IV

The objecting creditors should be required to pay the cost of this particular proceeding.

From the foregoing Findings of Fact, and Conclusions of Law, It is hereby Ordered as follows:

ORDER

I

The previous order of Referee Dickson on December 9, 1953, confirming the original bid of R. T. Colter is hereby vacated and set aside.

II

The proposed sale of all of the real and personal property of this bankrupt estate, except cash and cash accumulations, to R. T. Colter and Robbie E. Colter his wife, as joint tenants, for the sum of $407,000.00 be and the same is hereby confirmed.

III

Costs of this proceeding shall be taxed jointly against the objecting creditors by the Referee on two days notice pursuant to Federal Rule of Civil Procedure 54(d).

IV

Upon the full payment to Trustee Sampsell of the said sum of $407,000.00, the said Trustee shall execute and deliver to R. T. Colter and Robbie E. Colter his wife, as joint tenants, the following:

(a) A good and sufficient deed to the right, title and interest of the bankrupt estate in and to the real properties situate in the County of Los Angeles, State of California, designated herein as parcels 1-17 inclusive, and 19-24 inclusive, and described as follows:

All that real property in the County of Los Angeles, State of California, described as follows:

PARCEL 1.

That portion of the Rancho Los Cerritos, in the City of Long Beach, described as follows:

Beginning at the most southwesterly corner of the land described in the deed to the Title Insurance and Trust Company, recorded in Book 5577, Page 105 of Deeds, records of said county, in the northwesterly line of Channel No. 3, Long Beach Harbor; thence along said Northwesterly line, South 64° 42′ 30″ West 250 feet; thence North 19° 42′ 30″ East 738.08 feet; thence North 64° 42′ 30″ East 250 feet to the most northwesterly corner of the land described in said deed to Title Insurance and Trust Company; thence along the northwesterly line of said land so described, South 19° 42′ 30″ West 738.08 feet to the point of beginning.

EXCEPTING and portion of said land, which at any time was tide land, which was not formed by the deposit of alluvion from natural causes and by imperceptible degrees.

NOTE: In Book 1, Page 10 of the County Recorder's assessment maps, is the record of a map filed February 9, 1917, made by the City Engineer of the City of Long Beach for local assessment purposes only, upon which map the above described property is designated as Lot 18.

THOSE LOTS and portions of lots in Tract No. 250, in the City of Glendale, as per map recorded in Book 15, Pages 130 and 131 of Maps, in the office of the County Recorder of said County described as follows:

PARCEL 2.

Lot 179½ of said Tract No. 250.

EXCEPTING the northerly 135 feet of said lot,

ALSO EXCEPTING that portion of the remainder of said lot included within the following boundaries:

Beginning at the northwest corner of Lot 180½ of said Tract No. 250: thence along the northerly line of said lot, South 81° 16′ 15″ East 120 feet to the true point of beginning for this description; thence South 8° 43′ 45″ West 150.68 feet on a line parallel with the westerly line of said lot, and distant 120 feet, measured along the northerly line of said lot from the northwest corner thereof to its point of intersection with a curve having a radius of 91.01 feet, a radial line from said curve at said point of intersection bears South 13° 21′ 15″ East; thence northeasterly in a direct line to a point on a line drawn parallel with the westerly line of said Lot 179½ and distant 30 feet therefrom, measured along the northerly line of said lot from the northwest corner thereof, said point on said parallel line being South 8° 43′ 45″ West 135 feet from the northerly line of said lot; thence along said line parallel with the westerly line of said lot 179½, North 8° 43′ 45″ East 135 feet to the northerly line of said lot; thence along the northerly line of said lots 179½ and 180½, North 81° 16′ 15″ West 60 feet to the point of beginning.

PARCEL 3.

Lot 180½ of said Tract No. 250.

EXCEPTING those portions of said lot described as follows:

Portion 1. Beginning at the northwest corner of said lot; thence along the westerly line of said lot, South 8° 43′ 45″ West 162.77 feet to a point on a curve concave southerly, having a radius of 66.91 feet, a radial line from said last mentioned point bears South 1° 12′ 15″ West; thence, easterly along said curve, 23.60 feet; thence South 68° 35′ 20″ East 37.69 feet to the point of beginning of a tangent curve concave northerly, having a radius of 44.16 feet; thence easterly along said curve, 36.57 feet; thence North 63° 57′ 40″ East 8.78 feet to the point of beginning of tangent curve southerly, having a radius of 91.01 feet; thence easterly along said curve, 20.15 feet to an intersection with a line drawn parallel with the westernly line of said lot, distant 120.00 feet, measured along the northerly line of said lot from the northwest corner thereof, a radial line from said curve at its point of intersection with the said parallel line bears South 13° 21′ 13″ East; thence North 8° 43′ 45″ East along said parallel line, 150.68 feet to the northerly line of said lot; thence along the northerly line of said lot, North 81° 16′ 15″ West 120.00 feet to the point of beginning.

Portion 2. Beginning at the northwest corner of said Lot 180½; thence along the northerly line of said lot, South 81° 16′ 15″ East 120 feet to the true point of beginning for this description; thence South 8° 43′ 45″ West 150.68 feet on a line parallel with the westerly line of said lot and distant 120 feet, measured along the northerly line of said lot from the northwest corner thereof to its point of intersection with a curve, having a radius of 91.01 feet, a radial line from said curve at said point of intersection bears South 13° 21′ 15″ East; thence

northeasterly in a direct line to a point on a line drawn parallel with the westerly line of said lot 179½, and distant 30 feet therefrom, measured along the northerly line of said lot from the northwest corner thereof, said point on said parallel line being South 8° 43′ 45″ West 135 feet from the with the westerly line of said lot and distant 120 parallel with the westerly line of said Lot 179½, North 8° 43′ 45″ East 135 feet to the northerly line of said Lot; thence along the northerly line of said Lots 179½ and 180½, North 81° 16′ 15″ West 60 feet to the point of beginning.

PARCEL 4.

Lot 181½ of said Tract No. 250.

EXCEPTING that portion of said lot described as follows:

Beginning at the northeast corner of Lot 181½; thence along the easterly line of said lot, South 8° 43′ 45″ West 162.77 feet to a point in tangent curve concave southerly, having a radius of 66.91 feet, radial line from said last mentioned point bears South 1° 12′ 15″ West; thence Westerly along said curve, 38.54 feet; thence South 58° 12′ 10″ West 21.05 feet to point of beginning of tangent curve concave northerly, and having a radius of 92.98 feet; thence westerly along said curve, 43.94 feet; thence South 85° 16′ 40″ West 10.71 feet to point of beginning of tangent curve northerly and having a radius of 103.83 feet; thence westerly along said curve, 20.30 feet to a point from which a radial line bears North 6° 28′ 55″ East; thence North 8° 43′ 45″ East parallel with the easterly line of said lot 181½, 216.95 feet to the northerly line

of said lot; thence South 81° 16' 15" East 120.00 feet to the point of beginning.

PARCEL 5.

All of Laurita Place, vacated, as shown on the map of said Tract No. 250.

PARCEL 6.

Lots 184, 186, 188 and 189, of said Tract No. 250.

PARCEL 7.

Lot 185 of said Tract No. 250.

EXCEPTING THAT portion of said lot lying northeasterly of a line drawn from the southwest corner of lot 178½ of said Tract No. 250 to the most westerly corner of lot 186 of said Tract.

PARCEL 8.

A fifty-foot easement for street or road purposes and installation and maintenance of public utilities over that portion of Lot 185 of said Tract No. 250, lying northeasterly of a line drawn from the southwest corner of lot 178½ to the most westerly corner of lot 186 of said Tract No. 250, and lying 25 feet on either side of the following described center line:

Beginning at a point in the south line of Colina Drive, distant thereon North 75° 50' West 39.38 feet from the northeast corner of said lot 185, said point being the beginning of a non-tangent curve concave to the northwest, having a radius of 566.50 feet, a radial line through said point having a bearing of North 47° 57' West; thence southwesterly along said curve, 175.79 feet, more or less, to a point in the southwest line of the above described

portion, distant thereon South 59° 11′ 25″ East 178.56 feet from the southwest corner of lot 178½ of said Tract No. 250, a radial line through said point bears North 30° 10′ 15″ West.

The side lines of said easement being prolonged or shortened to intersect the south line of Colina Drive and the southwesterly line of said described portion.

PARCEL 9.

Lot 190 of said Tract No. 250, and the south one-half of Colina Drive, vacated, adjacent thereto.

PARCEL 10.

Lot 191 of said Tract No. 250.

AND the westerly one-half of vacated portion of Colina Drive adjacent, except those portions thereof included within the lines of the following described parcel:

Beginning at the northwest corner of Lot 13, of Tract No. 250; thence along the prolongation of the north line of said Lot 13, South 88° 36′ West 52.98 feet; thence South 39° 07′ East 64.08 feet to the beginning of a curve concave to the southwest, having a radius of 285.47 feet; thence southeasterly along said curve, 49.49 feet to an angle point in the westerly line of said lot 13, distant North 29° 11′ West 54.21 feet from the southwest corner of said lot 13; thence northerly along the westerly line of said lot 13, 93.79 feet to the point of beginning.

PARCEL 11.

Lot 195 of said Tract No. 250.

EXCEPTING that portion of said lot described as follows:

Bounded on the south by the northerly lines of lots 5 and 6 of Tract No. 11274, as per map recorded in book 202 page 11 of Maps, records of said county; on the North by a line parallel with and distant northerly 75 feet, measured at right angles from said northerly line of lots 5 and 6; on the east by the northerly prolongation of the easterly line of lot 3 of said Tract No. 11274, and on the west by the northeasterly prolongation of that certain course in the northwesterly line of said lot 6, having a length of 178 feet.

PARCEL 12.

Lot 16 of Tract 2052, in the City of Los Angeles, as per map recorded in book 28 pages 67 and 68 of Maps, in the office of the county recorder of said county.

PARCEL 13.

Lots 43, 44 and 45 of Tract No. 6409, in the City of Glendale, as per map recorded in book 114, pages 3 and 4 of Maps, in the office of the county recorder of said county.

Those portions of Lots in Tract 7146, in the City of Glendale, as per map recorded in Book 76 page 15 of Maps, in the office of the county recorder of said county.

PARCEL 14.

That part of Lot 8 of said Tract No. 7146, described as follows:

Beginning at a point in the northerly line of said Lot 8, distant North 83° 51′ 10″ East 80.08 feet from the northwest corner of said lot 8; thence South 3° 09′ East parallel with the westerly line of said lot 8, 83.66 feet to a point on the southerly line of said lot; thence South 89° 39′ East along said southerly line, 19.81 feet to the point of beginning of a curve concave northwesterly and having a radius of 15 feet; thence northwesterly along said curve, a distance of 25.96 feet to a point in the easterly line of said lot; thence along the said easterly line, North 8° 49′ 10″ West 23.20 feet to an angle point in said easterly line; thence North 13° 31′ 20″ West 47.40 feet to the northeast corner of said lot; thence South 83° 51′ 10″ West 24.84 feet to the point of beginning.

PARCEL 15.

That part of Lot 9 of said Tract No. 7146, described as follows:

Beginning at the southeast corner of said Lot 9; thence South 85° 45′ 30″ West along the southerly line of said lot, 50.82 feet; thence North 3° 09′ West parallel with the westerly line of said lot, 108.92 feet to a point in the northerly line of said lot; thence South 89° 39′ East along said northerly line, 27.68 feet to the point of beginning of a curve concave southwesterly, having a radius of 15 feet; thence southeasterly along said curve, a distance of 21.16 feet to a point in the easterly line of said lot; thence South 8° 49′ 10″ East along said easterly line, 89.73 feet to the point of beginning of a curve concave westerly, and having a radius of 212.80 feet; thence southerly along

said curve, a distance of 3.50 feet to the point of beginning.

PARCEL 16.

That part of lot 12 of said Tract No. 7146, described as follows:

Beginning at a point in the northerly line of said lot, distant North 85° 45′ 30″ East 79.98 feet from the northwest corner of said lot; thence South 3° 09′ East parallel with the westerly line of said lot, 90.37 feet to a point in the southerly line of said lot, said point being situated on a curve concave southerly and having a radius of 145 feet, a radial line from said point bearing South 9° 36′ 09″ West; thence easterly along said curve, a distance of 20.85 feet to the point of beginning of a curve concave northerly, and having a radius of 15 feet, a radial line from said point bearing North 17° 49′ 20″ East; thence Easterly along said curve, a distance of 23.97 feet to a point in the easterly line of said lot, said point being the point of beginning of a curve concave westerly, and having a radius of 212.80 feet, a radial line from said point bearing North 73° 43′ 21″ West; thence northerly along said curve, a distance of 89.71 feet to the northeast corner of said lot; thence South 85° 45′ 30″ West 50.82 feet to the point of beginning.

PARCEL 17.

That part of Lot 13 of said Tract No. 7146, described as follows:

Beginning at a point on the southerly line of said lot, distant North 88° 36′ East 40 feet from the southwest corner of said lot; thence North 3° 09′ West parallel with the westerly line of said lot,

125.64 feet to a point in the northerly line of said lot, said point being situated on a curve concave southerly and having a radius of 115 feet, a radial line from said point bearing South 7° 09′ 33″ East; thence easterly along said curve, a distance of 47.84 feet to the point of beginning of a curve concave southwesterly and having a radius of 15 feet, a radial line from said point bearing South 16° 42′ 35″ West; thence southeasterly along said curve, a distance of 24.45 feet to a point in the easterly line of said lot; thence South 20° 05′ 45″ West along said easterly line, 108.24 feet to the southeast corner of said lot; thence South 88° 36′ West 13.03 feet to the point of beginning.

PARCEL 19.

That portion of the 3365.95 acre allotment of Maria Dolores Dominguez de Watson, in the Rancho San Pedro, City of Los Angeles, described as follows:

Beginning at the intersection of the northerly line of Grant Avenue (formerly Watson Alley) with the northerly prolongation of the west line of Block 10 of Dominguez Harbor Tract, recorded in book 12 pages 14 and 15 of Maps, in the office of the county recorder of said county; thence southerly along the prolongation and west line of said block 10 to the north line of the 50 foot right of way of the Southern Pacific Railroad; thence northwesterly along said north line to the west prolongation of said north line of Grant Avenue; thence easterly along said prolongation to the point of beginning.

EXCEPT that portion thereof, if any, included in drainage chennel of Nigger Slough.

ALSO EXCEPTING that portion described as follows:

Beginning at a point in the prolongation west of the north line of Grant Street, formerly Watson Alley (30 feet wide) as shown on map of the Dominguez Harbor Tract, recorded in Book 12 page 14 of Maps, records of said county, distant South 84° 42′ 22″ West 21.35 feet, measured along said prolonged line of Grant Street from the north prolongation of the west line of Block 10 of said Dominguez Harbor Tract; said point of beginning being a point in a curve concave southeast and having a radius of 914.37 feet, the tangent to said curve at said point bearng South 75° 36′ 50″ West; thence southwest along said curve, 243.76 feet to a point in the north line of the 50 foot right of way of the Southern Pacific Railroad, distant North 72° 13′ 38″ West 276.5 feet, more or less, measured along said north line from the south prolongation of the west line of said block 10 of Dominguez Harbor Tract; thence along the north line of said 50 foot right of way, North 72° 13′ 38″ West 90.43 feet to a point in a curve concave southeast, and having a radius of 982.88 feet the tangent to said curve bearing North 56° 46′ 16″ East; thence northeast along said curve 79.91 feet to a point in said prolongation west of the north line of Grant Street, distant South 84° 42′ 22″ West 265.27 feet, measured along said prolonged line from the north prolongation of the west line of said block 10 of Dominguez Harbor Tract; thence along said pro-

longed line of Grant Street, North 84° 42′ 22″ East 243.92 feet to the point of beginning.

PARCEL 20.

Block 22 of Selvas de Verdugo, in the City of Glendale, as per map recorded in Book 37, pages 77 to 83 inclusive of Maps, in the office of the County recorder of said county.

EXCEPT that portion deeded to the City of Glendale for street purposes to be known as Hillside Drive, by deed recorded in Book 5627 page 320 of Official Records.

PARCEL 21.

Lot 20, Block 25, and Lots 1 and 21, Block 26, of said Selvas de Verdugo, Sheet 8, in the City of Glendale, as per map recorded in book 44 page 64 of Maps, in the office of the county recorder of said county.

PARCEL 22.

Lots 2, 3, and 22, Block 42 of said Selvas de Verdugo, in the City of Glendale, as per map recorded in book 84 pages 99 and 100 of Maps, in the office of the county recorder of said county,

EXCEPT from said land that portion included in the 150 foot strip of land conveyed to Southern California Edison Company, a corporation, by deed recorded in book 4602 page 238 of Official Records.

ALSO EXCEPTING therefrom those portions of said land lying southwesterly of the southwesterly line of the 90 foot right of way of the Los Angeles County Flood Control District, as described

in Decree of Condemnation recorded February 24, 1952 in book 19124 page 278 of Official Records.

PARCEL 23.

Lots 16, 17 and 19, Block 43 of said Selvas de Verdugo, in the City of Glendale , as per map recorded in book 84 pages 99 and 100 of Maps, in the office of the county recorder of said county.

EXCEPT from said land that portion included in the 150 foot strip of land conveyed to Southern California Edison Company, a corporation, by deed recorded in book 4602 page 238 of Official Records.

ALSO EXCEPTING therefrom those portions of said land lying southwesterly of the southwesterly line of the 90 foot right of way of the Los Angeles County Flood Control District, as described in Decree of Condemnation recorded February 24, 1952 in book 19124 page 278 of Official Records.

PARCEL 24.

Lot 3 of the Verdugo Estate, in the City of Glendale, as per map recorded in Book 12 pages 34 and 35 of Maps, in the office of the county recorder of said county.

EXCEPT those portions described as follows:

Beginning at a point in the northerly boundary line of said Lot 3 of the Verdugo Estate, which point is distant South 88° 37′ West 43.54 feet along said northerly boundary from the easterly terminus of that certain course in said northerly boundary line shown on said above mentioned map as having a bearing of North 88° 37′ East and a length of 19.185 chains; thence from said point of

beginning, North 88° 37′ East 43.54 feet along the northerly boundary line of said Lot 3 to an angle point; thence South 62° 15′ East 577.50 feet along the northeasterly boundary line of said lot to the most easterly corner of said Lot 3; thence along the easterly boundary line of said Lot 3, the following five courses and distances; South 30° 54′ 20″ West 427.9 feet; South 6° 3′ 40″ West 901.96 feet; South 56° 32′ 25″ West 200.49 feet; South 0° 57′ 50′ West 264.60 feet, and South 29° 24′ West 135.36 feet; thence North 0° 02′ 55″ West 2023.95 feet, more or less, to the point of beginning.

ALSO EXCEPTING a strip of land 150 feet in width across said Lot 3 as conveyed to Southern California Edison Company by deed recorded in Book 4602, page 238 of Official Records.

(b) A good and sufficient deed to the right, title and interest of the bankrupt estate in and to the real property situate in the County of Tulare, State of California, described as follows:

That portion of the Southwest quarter of the Northwest quarter of Section Twelve (12) and of the north half of the Southwest quarter of Section 12, Township Twenty-three (23) South, Range Twenty-three (23) East, Mount Diablo Base and Meridian, according to the official plat of the survey of said land on file in the Bureau of Land Management at the date of the issuance of the Patent thereof, lying West of the Right of Way of the Atchison, Topeka and Santa Fe Railroad Right of Way

EXCEPT therefrom that portion thereof included within the following boundary: Commenc-

ing at the intersection of the South boundary of the Northwest quarter of said Section 12, with the Southwestern boundary of the Atchison, Topeka and Santa Fe Railroad Company's Right of Way as deeded in deed recorded in Book 83, Page 167 of Deeds; thence West along the South line of said Northwest quarter of said Section 12, 115.8 feet, more or less, to a point 100 feet at right angles Southwesterly from said Southwestern boundary of Right of Way; thence Northwesterly parallel with said Southwestern boundary of Right of Way 1000 feet; thence at right angles Northeasterly 100 feet to point on said Right of Way boundary; thence in a direct line along said Southwestern boundary of said Right of Way to point of commencement.

Each of the above described real properties is subject to: Conditions, restrictions, reservations, easements, rights, leases, rights of way, if any, of record and exceptions noted in the preliminary title reports attached to the Petition filed herein on November 3, 1953, marked Exhibits 2-17 inclusive and Exhibits 19-28 inclusive; taxes for the fiscal year 1953-54 to be prorated as of date of order confirming sale; and subject to taxes for fiscal year 1954-55, a lien but not yet payable.

(c) A good and sufficient Bill of Sale transferring to said R. T. COLTER and ROBBIE E. COLTER, his wife, as joint tenants, the right, title and interest of the bankrupt estate in and to personal property described as follows:

1—3 drawer letter size steel file

4—metal map cases — roller type

1—center drop typewriter desk — oak

9—Oak arm chairs

4—3 drawer letter size steel files
1—2 drawer — 2 cash drawers — letter size steel files
1—3 drawer — legal size — steel file
2—4 drawer — letter size steel files
1—14″ Underwood Typewriter — elite type
1—typewriter table — oak
1—oak-flat — linoleum top table
1—card file — desk type
1—oak table — filing
1—oak — roll top desk
1—oak desk — flat linoleum top
1—Monroe Calculator — hand type
1—Error-no (needs repairing)
1—Electric heater
1—oak — swivel chair
1—Typewriter chair — oak
1—oak map cabinet file — 8 drawers
1—oak — legal size — desk file
1—oak desk companion
1—6 drawer — 5″ x 8″ — Y & E file — oak
1—8 drawer — 6″ x 4″ — Y & E file — oak
1 drawer — letter size
1—telephone table — oak
1—oak — 4 drawer desk letter file
1—oak file — legal size
1—oak file — legal size
1—typewriter chair — oak
1—legal size — transfer drawer
1—2 drawer card file — oak — 3″ x 5″
1—oak map cabinet file

1—14 drawer file cabinet
1—oak costumer (hat tree)
1—oak — 7 drawer — desk letter file
(At Mr. Sampsell's warehouse or on consignment)
13—letter size steel transfer files
1—12 bank & date — Burroughs adding machine (out of order) (In storage at 3235 N. Verdugo Road, Glendale)
1—roll top desk — oak
1—flat top desk (from which rolltop has been removed)
2--smal desks — salesman type
1—director's table
1—gas heater
3—office arm chairs
1—swivel chair
(all golden oak finish)

(d) An assignment, without recourse or warranty, of the right, title and interest of the bankrupt estate in and to a certain oil and gas lease between Security-First National Bank of Los Angeles, F. P. Newport Corporation, Ltd., a corporation bankrupt, and H. F. Metcalf as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., Lessors, and Universal Consolidated Oil Company, a corporation, Lessee, dated January 14, 1938, and recorded February 14, 1938, in Book 15515 at Page 326 of Official Records of Los Angeles County, California; the right, title and interest of said Trustee in and to said lease being as set forth in the preliminary reports of Title Insurance and Trust Company attached to the Petition filed here-

in on November 3, 1953, and marked Exhibits 1a and 1b.

(e) An assignment, without recourse or warranty, of that certain promissory note dated April 23, 1953, in the principal sum of $1500 executed by Marie H. Little in favor of Paul W. Sampsell as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd.

(f) An assignment of deed of trust from said Marie H. Little in favor of Title Insurance and Trust Company, as Trustee, given to secure payment of said $1500 note, which deed of trust was recorded on April 30, 1953, in Book 41605 at Pages 33 and 34 of Official Records of Los Angeles County, California.

V

Paul W. Sampsell, as Trustee, is hereby directed to pay out of the proceeds of said sale, when and as received, the cost of policies of title insurance, transfer taxes, seller's proportion of escrow fees, and other costs and expenses in connection with said sale.

Dated this 3rd day of May, 1954.

May

Dated this 3 day of ~~April,~~ 1954.

REUBEN G. GRANT

(Reuben G. Hunt)
Referee in Bankruptcy

APPROVED AS TO FORM this 26th day of April, 1954.

EDMUND NELSON and WINFIELD JONES
By EDMUND NELSON
Counsel for Bank of America
WM. H. NEBBLET
(Wm. H. Neblett)
Counsel for R. T. Colter and
Robbie E. Colter his wife,
as joint tenants.

APPENDIX B

[TITLE OF COURT AND CAUSE.]

FILED July 12, 1954.

EDMUND L. SMITH, Clerk.

By C. A. SIMMONS, Deputy Clerk.

ORDER AFFIRMING ORDER OF REFEREE CONFIRMING SALE OF REAL AND PERSONAL PROPERTY TO R. T. COLTER AND ROBBIE E. COLTER HIS WIFE AS JOINT TENANTS.

Honorable Reuben G. Hunt, Referee in Bankruptcy, having heretofore, on May 3, 1954, signed and filed his Order Confirming the Sale of the real and personal property belonging to said estate (exclusive of cash and cash accumulations) to R. T. Colter and Robbie E. Colter his wife, as joint tenants, for the sum of $407,000; and the bankrupt and certain unsecured creditors having filed herein their petition to the above entitled Court for the review of said Order; said review came on regularly to be heard before the Honorable Leon R. Yankwich Chief Judge of said Court on June 28, 1954, at 10 o'clock a. m., pursuant to notice of the time and place of said hearing duly and regularly given as provided by law.

The Trustee herein, Paul W. Sampsell, appeared in person and by his counsel Messrs. Bailie, Turner, Lake & Sprague by Norman A. Bailie, Esq., Bank of Amer-

ica National Trust and Savings Association, an unsecured creditors appeared by its counsel Edmund Nelson Esq., and / Winfield Jones Esq., and petitioners Attys appeared by their counsel, L. M. Cahill Esq. The Court being familiar with the record on review and having heard and considered the arguments of counsel, and being fully advised in the premises, makes and files his Order on said review as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Findings heretofore made herein by the Referee are hereby adopted as the Findings of the Court.

2. That the Order of the Referee made and filed herein on May 3, 1954, Confirming the sale of the assets described in said Order to R. T. Colter and Robbie E. Colter his wife, as joint tenants, be and it is hereby affirmed.

Dated this 12th day of July, 1954.

LEON R. YANKWICH
Chief Judge
United States District Court

APPENDIX C

In re F. P. NEWPORT CORP., Limited.
No. 25308.
United States District Court,
S. D. California, Central Division.

July 6, 1954.

YANKWICH, Chief Judge.

The bankrupt and certain unsecured creditors seek to review an Order of the Referee dated May 3, 1954, confirming a sale of all the assets of the bankrupt, except certain cash, to R. T. Colter and Robbie E. Colter, his wife, as joint tenants for the sum of $407,000. Involved were 25 pieces of real property and some personal property and interests in a leasehold, deed of trust and promissory notes. The estate has been in court for over nineteen years. It began as an involuntary proceeding filed on March 19, 1935. An adjudication was made on January 12, 1937. Throughout the proceedings, it has been the attitude of the bankrupt that, *if given long enough time,* its difficulties could be worked out.

This review must be considered in the light of this attitude and against the background of a "protracted" administration, — as the Judge who handled it for many years characterized it. For it was the contention of the bankrupt at the conclusion of the hearing before the Referee on the Petition to Sell that, *at all times,*

matters could have been worked out differently. But the Referee correctly stated:

> "A bankrupt case is a lot different than where the property is in private hands. If the man has property in his own hands not subject to legal process or creditors' claims, he can wait indefinitely. But a bankrupt estate can't. *It is the creditors' funds and they are entitled to get paid sometime.* The only question here is haven't we come to the end of the trail? *How much longer are we going to put the creditors off, how much longer are they going to be put off before they get their money? If I had any evidence before me to show that you could within a reasonably short time—any definite evidence—get a better buyer, that would be an entirely different situation.*" (Page 586) (Emphasis added.)

Significantly, the two most recent acts in the bankruptcy proceeding, which occurred before the present Order of Sale, were opposed *upon the same nebulous ground that, as the condition of the estate is improving, additional time might bring better results.*

So we find that when there came before the Court the question of compromising a claim of Security First National Bank of Los Angeles, one of its largest creditors, the Court delayed confirmation from April 30, 1951, to October 2, 1951, in the hope that a better offer or a different solution would be found. To the Order confirming the Compromise, dated October 22, 1951, the Honorable Paul J. McCormick, a Judge of this

court of long experience, who, despite retirement, undertook the laborious task of continuing to act in this case, appended a statement to this effect:

> "It is to be observed that the court has since the submission of this review deferred decision for almost four months to accord all parties interested in this bankrupt estate to submit for consideration *a plan or method that is more beneficial and equitable to the estate than the compromise under review. None such has been presented or offered.*" (Emphasis added.)

A similar situation arose when the Court was confronted with the review of an Order of the Referee, dated May 26, 1952, ordering liquidation. Bankruptcy Act, § 2, sub. a(7), 11 U.S.C.A. § 11, sub. a(7). Judge McCormick kept the matter under submission from July 24, 1952, to November 28, 1952. His Order confirming the Order of Liquidation, which has now become final, contained the following statement:

> "Although thoroughly argued by the respective parties on the hearing and it appearing at that time to be warranted by the record and files of this protracted bankruptcy proceeding, it was believed by the Judge that if decision on the Referee's order of liquidation *were deferred for a reasonable period, some other lawfully-authorized equitable method of settlement would be forthcoming and duly proposed. Such other proceeding now seems to be unavailable.*" (Emphasis added.)

The present sale goes back to an Order of the Referee, dated December 9, 1953. On review being taken from it, the Court returned the matter to the Referee on January 29, 1954, with direction that he hold further proceedings towards making the conditions of the sale more definite. His direction was that

> ". . . counsel for Trustee, Norman Bailie, Esq. prepare, serve on other counsel, and present to the Court for approval and signature Order referring this matter to the Referee for the purposes of conducting a hearing and if possible obtaining a definite and positive and certain bid for the property; and if the present bidder desires to withdraw his deposit within ten days, he may do so, and if he does not, his bid may be considered when further proceedings are had before the referee." (Minute Order of January 19, 1954)

A formal Order was entered on February 9, 1954, which read:

> "It Is Hereby Ordered: That the proceeding for the sale of the assets of said bankrupt estate before the Court on review of the Order of the Referee in Bankruptcy, signed and filed on December 9, 1953, be and it is hereby re-referred to the Honorable Hugh L. Dickson, Referee in Bankruptcy, for the purpose of conducting *a further formal hearing in court pursuant to the Bankruptcy Act, and in such manner as his judgment and discretion shall warrant, and, if possible, obtaining a firm, definite, positive, certain bid for*

the property of the bankrupt estate." (Emphasis added.)

An amended and supplemental petition for authority to sell was filed on March 15, 1954. New notices were given. Objections were filed by the petitioners. Further proceedings were had, and, after bidding in open court, the property was sold to the Colters for the sum of $407,000. The hearing of objections before the Referee was extensive and the transcript covering 588 pages is before me. The Referee, on May 3, 1954, filed full Findings and confirmed the sale. In addition, the Referee set forth in a 37-page opinion the reasons why, in his opinion, the sale should be made in the particular manner and at the stated price. In it the objections of the bankrupt and certain unsecured creditors, who prosecute this review, are considered fully and answered.

We start with the accepted principle that even before the adoption of the Federal Rules of Civil Procedure and their application to bankruptcy, it was the law of this Circuit that the Findings of a Referee on conflicting evidence would not be disturbed. See, *Weisstein Bros. & Survol v. Laugharn,* 9 Cir., 1936, 84 F. 2d 419, 420. The Federal Rules of Civil Procedure and the General Bankruptcy Orders, 11 U.S.C.A. following section 53, now provide that the Findings of a Referee shall not be overturned unless they are "clearly erroneous". Federal Rules of Civil Procedure, Rules 52 (a), 53(c) (2), 28 U.S.C.A.; General Bankruptcy

Orders 36, 47; *Diamond Laundry Corp. v. California Empl. Stab. Comm.*, 9 Cir., 1947, 162 F. 2d 398, 401; *Ashton v. Sentney*, 9 Cir., 1944, 145 F. 2d 719, 720; *McInnes v. Publishers' Service Co.*, 2 Cir., 1949, 174 F. 2d 647; 648; *Knetzer v. Larkin*, 2 Cir., 1949, 178 F. 2d 532, 534. And see the writer's opinion in Re Christ's Church of the Golden Rule, D. C. Cal. 1948, 79 F. Supp. 42.

The chief grounds urged are that the sale is below the official appraisal, and that the Referee ordered the sale of all the estate in bulk rather than segregating the properties and selling them separately. The Referee heard evidence as to the present value of the property. And we know of no rule or practice that would warrant the Court in setting aside the Order of the Referee where he uses his best judgment both as to the method of sale and as to the sufficiency of the price at which the sale was made.

Mere inadequacy of price is not a ground for setting aside a sale in equity. See, *Webster v. Barnes Banking Co.*, 10 Cir., 1040, 113 F. 2d 1003, 1005; *Gelfert v. National City Bank*, 1941, 313 U. S. 221, 232, 61 S. Ct. 898, 85 L. Ed. 1299; *Allen v. Union Transfer Co.*, 10 Cir., 1945, 152 F. 2d 633, 635. Numerous instances exist in bankruptcy where actual values,—that is, *values in the market place*,—are far below the appraised value, and the Referee must be left free to use his judgment in determining whether a sale at a better price could be obtained. *The objectors produced no better buyer.*

In the present case the Referee estimated that the Colter bid was about 75 per cent of the "adjusted appraisement". (See, Supplement to Memorandum Opinion, dated April 28, 1954.) None of the other points urged by the bankrupt against the validity of the sale have merit. The Referee had jurisdiction to hear the matter. Adequate notice of the proposed sale was given. Objections were filed. Opportunity was afforded to increase the bid, and, on the hearing of objections to confirmation, the Referee very painstakingly heard evidence as to matters put in question both as to the method of sale and price, and the hopes of the bankrupt that further delay might bring more to the estate than the instant sale.

In view of what precedes, it is quite evident that unless we find some legal principle in the light of which the action of the Referee is illegal, or that he drew erroneous conclusions from admitted facts, the Order must be affirmed. See *In re Christ's Church of the Golden Rule,* D. C. Cal. 1948, 79 F. Supp. 42; *In re Eastern Oil Co.,* 9 Cir., 1938, 100 F. 2d 341; *Carr v. Southern Pacific Co.,* 9 Cir., 1942, 128 F. 2d 764, 768; *Knetzer v. Larkin, supra.* And see, the opinion of *Judge Carter in Re Ward Mfg. Co.,* D. C. Cal. 1950, 89 F. Supp. 500. The objectors have pointed to no such legal principles. As stated, the Referee had jurisdiction to make the sale. He held further hearings as directed by Judge McCormick and secured a better price and more definite terms. The contention that it is still possible to reorganize the corporation is illusory. No. valid

plan of reorganization has been proposed during the course of this long administration. And the Referee, having ordered liquidation on May 26, 1952, an Order which has been affirmed by this court, and *has become final,* this Court is not in a position, at the present time, to undo *the finality of that act* and start once more the laborious process of attempting to reorganize the bankrupt estate after a nineteen years "protracted" bankruptcy proceeding. The Referee found specifically that the objectors have not produced any substantial person willing to advance the moneys to liquidate the estate in any other manner and that the sale of all the assets was the only alternative. (See, Findings XIV-XVI.) More, it would be a bad precedent to establish in bankruptcy for a court *at this late date* to undo the work of Referees and members of this Court who have worked long and diligently over the course of years in administering a bankrupt estate, and finally determined upon a method of terminating the long gestation of this bankrupt in bankruptcy. After all, even bankruptcy proceedings should terminate some time. That the stockholders will receive nothing is one of the inevitable incidences of investing in a corporation which fails ultimately. And the chief concern of the bankruptcy court is the creditor. For the main object of bankruptcy is to secure the equitable distribution of the bankrupt's estate among his creditors and discharge him of his debts. See, *Wilson v. City Bank of St. Paul,* 1873, 17 Wall. 473, 480, 21 L. Ed. 723; *Straton v. New,* 1931, 283 U. S. 318, 320-321, 51 S. Ct. 465, 75 L. Ed. 1060.

The Referee was also right in allowing interest to the unsecured creditors. In all liquidations, whether under bankruptcy or other statutes, if there be a surplus in the estate, interest is allowed on unsecured claims. See, *In re John Osborn's Sons & Co., Inc.,* 2 Cir., 1910, 177 F. 184, 29 L.R.A., N.S., 887; *Johnson v. Norris,* 5 Cir., 1911, 190 F. 459, 463—465, L.R.A. 1915B, 884; *American Iron & Steel Mfg. Co. v. Seabard Air Line Ry.,* 1914, 233 U. S. 261, 34 S. Ct. 502, 58 L. Ed. 949; *Federal Deposit Ins. Corp. v. Citizens State Bank of Niangua,* 8 Cir. 1942, 130 F. 2d 102; *Ticonic Nat. Bank v. Sprague,* 1938, 303 U. S. 406, 410-411, 58 S. Ct. 612, 82 L. Ed. 926; *Fujikawa v. Sunrise Soda Water Works Co.,* 9 Cir., 1946, 158 F. 2d 490, 494-495; *Hightstown Rug Co. v. National Savings and Trust Co.,* 1947, 82 U. S. App. D. C. 204, 162 F. 2d 10.

The theory behind the cases is that regardless of any direct agreement, interest is due the creditor the moment his debt becomes due and is not paid. If the estate, whether in bankruptcy, receivership, or statutory liquidation, is insolvent, the interest, although it runs during the period when the assets are insufficient to pay the principal of the claims, will not be paid. But if there is a surplus, interest will be paid. And this rule applies whether the liquidation is brought about by the voluntary act of the debtor or by the act of creditors or statutory liquidating authorities. The objection to interest reveals once more the inconsistency in the attitude of the bankrupt in this case. On the one hand, after it has succeeded in keeping the

estate in court for nearly twenty years, it still insists that the period should be extended further and the sale of all the remaining assets be denied approved by the Court. Yet it would deny to its unsecured creditors the right to receive interest during the long period of this administration. One does not have the right to do business at the expense of one's creditors. And where the creditors have been denied the right to receive their principal debt when due, and through good management or good fortune, a surplus exists, it is more consonant with the equitable principles of bankruptcy that the surplus be used to pay interest to the creditors rather than that it be turned over to the bankrupt.

The Findings of the Referee are hereby approved and adopted as the Findings of this Court and the Order of the Referee Confirming the Sale is affirmed. Formal Order to follow.

APR 18 1955
HAROLD B. WILLEY, CL

No. 590

IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

F. P. NEWPORT CORPORATION, LTD.,
Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. NEWPORT CORPORATION, LTD., et al.,
Respondent.

PETITION FOR REHEARING

MOTION TO REMAND THE CASE TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MORRIS LAVINE
215 W. 7th Street
Los Angeles 14, California
Attorney for Petitioner.

TOPICAL INDEX

	Page
Motion to Remand the Case to the United States Court of Appeals for the Ninth Circuit	1
Petition for Rehearing	3
Certificate of Counsel	8

Acts

Bankruptcy Act	
Section 23, Title 11	1-2
Section 24, Title 11, Chap. 4, sec. 47	2

IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

F. P. NEWPORT CORPORATION, LTD., *Petitioner,* vs. PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. NEWPORT CORPORATION, LTD., et al., *Respondent.*	No. 590

MOTION TO REMAND THE CASE TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COMES NOW F. P. NEWPORT CORPORATION, LTD., petitioner and moves this Honorable Court to grant certiorari, vacate the judgment of the United States Court of Appeals for the Ninth Circuit, and remand the case to the Ninth Circuit for hearing of the case on its merits.

The Referee in Bankruptcy and United States District Court each heard the case on its merits. Section

23 of the Bankruptcy Act, Title 11, provides for the jurisdiction of District Courts to hear proceedings in Bankruptcy.

Section 24 of the Bankruptcy Act, Title 11, Chapter 4, §47, grants jurisdiction on appeal to the Circuit Courts of Appeals for the United States to hear proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in Bankruptcy to review, affirm, revise or reverse both in matters of law and in fact. The cause was a proceeding in bankruptcy heard on its merits in the United States District Court.

This motion is based upon the authority of Section 24 of the Bankruptcy Act, and all the records and files of the case.

Respectfully submitted,

Morris Lavine
Attorney for the Petitioner

IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

F. P. NEWPORT CORPORATION, LTD., *Petitioner,* vs. PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. NEWPORT CORPORATION, LTD., et al., *Respondent.*	No. 590

PETITION FOR REHEARING

To the Honorable Chief Justice Earl Warren, and the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, the F. P. NEWPORT CORPORATION, LTD., respectfully petitions for a rehearing of the Order of this Honorable Court denying certiorari to the petitioner and for a further order to remand the case to the United States Court of Appeals for the Ninth Circuit, for hearing of the appeal on its

merits, and in respect thereto your Petitioner respectfully sets out as follows:

(1) The Court in denying certiorari denied the petitioner a substantial right of appeal from the decision of the United States District Court on the merits of his case in the Bankruptcy proceeding.

(2) There has been an increase in the membership of the Court by the addition of a new justice since the original Petition for Certiorari was filed and petitioner may not have had four votes for certiorari, but may have with the addition of a new member of this court.

(3) This Court should re-examine the Petition to determine if the petitioner should not have his "day in court" in the Court of Appeals for the Ninth Circuit and if the case should not be remanded to the United States Court of Appeals for the Ninth Circuit for hearing of the case on its merits.

The petitioner here, the corporation, was thrown into involuntary bankruptcy during the depression years following 1933. At that time the corporation was one of the largest real estate operating corporations in Southern California. It owed in excess of two million dollars, particularly to the Security First National Bank of the City of Los Angeles.

Through careful operation through the years, with the permission of the Bankruptcy Court and thereunder a California franchise tax, but without paying that of Delaware, that two million dollars was paid off,

as shown by Appendix B in the original petition, and the only amount of indebtedness left to the unsecured creditors was the sum of $187,000.00.

After the payment of the larger sum and only leaving a small group of unsecured creditors who have not received the monies referred to, the Referee in Bankruptcy ordered the assets liquidated and a sale has been negotiated of those assets in the sum of $407,000.00.

The Referee not only approved the sale of $407,000.00 but approved of the payment of interest to the unsecured creditors, which interest he proposes to run back to 1935 and thus give the unsecured creditors approximately 135% interest, or distribute approximately $250,000.00 in interest, whereas the total amount of the claims themselves are only $187,00.00.

Under California law interest is only payable on judgments after their rendition. It is the position of petitioner that even if interest is allowable, it is only allowable from the date claims in bankruptcy are approved. The claims were not heard or approved until 1952. This would leave a substantial balance to petitioner. But the Referee has dated the interest back to 1935. This raises an important question of bankruptcy law never decided by this Honorable Court but which should be. Like a lawsuit or judgment in court, no interest is or should be payable until a judgment is rendered and if bankruptcy law must follow the law of the state of California, under the doctrine of *Erie v. Tompkins,* then under the law of the State of Cali-

fornia the interest would *only* run from the date of the judgment.

The date of an allowance of the claim, after hearing thereon by the Referee, would be analogous to the date when a judgment had been rendered in a lawsuit and interest should not date from any other date. If this is the proper construction of the law, then the petitioner, the bankrupt herein, would have approximately $200,000.00 or more coming back to it and after the payment in full of the claims of the unsecured creditors, and he should have his day in court on this issue.

The United States District Court reviewed the Referee's finding and opinion on this matter on the merits. The United States Court of Appeals, however, declined to consider the case on appeal on its *merits,* and only heard it on a Motion to Dismiss.

We respectfully submit that this was a denial of rights which Congress intended this appellant to have, and that this Court should grant a rehearing and reverse the order of the United States Court of Appeals and remand the case to the United States Court of Appeals for the Ninth Circuit for hearing on the merits of the order and judgment of the District Court, particularly with reference to this matter of interest. We submit that this very important question has been overlooked by this Honorable Court, and we therefore respectfully petition for rehearing and for a remand of the case to the United States Court of Appeals.

We did not ask for remanding the case in our original Petition, when we perhaps should have done so,

but in any event we do now ask that the case be remanded. Since the filing of the original petition another member has been added to the Court. We have no way of knowing how many justices voted for the original petition, and we know that it takes at least four judges to have a petition granted. Therefore, we ask the Court and the new member to re-examine the former petition and point in argument and motion herein made.

WHEREFORE, your Petitioner prays that this Honorable Court grant a rehearing of its Petition and reverse its previous order and remand the case to the United States Court of Appeals for the Ninth Circuit for hearing on its merits.

Morris Lavine
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

MORRIS LAVINE, attorney for petitioner, asserts that the foregoing Petition is filed in good faith and not for the purposes of delay, and that it is based upon occurrences since the filing of the original petition, and raises a substantial question in the law of bankruptcy which has not been, but should be decided by this Honorable Court.

Morris Lavine
Attorney for Petitioner